IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27192

DOROTHY SMIZER, in her individual capacity and as Personal Representative of the Estate of HARLAN SMIZER, Deceased.

Plaintiffs and Appellants,

v.

CHRISTINA DREY,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
GREGORY COUNTY, SOUTH DAKOTA

THE HONORABLE KATHLEEN F. TRANDAHL
CIRCUIT JUDGE

APPELLANT'S BRIEF

Michael D. Bornitz
Robert D. Trzynka
CUTLER LAW FIRM, LLP
100 North Phillips,
9th Floor
PO Box 1400
Sioux Falls, SD 57101-1400

Timothy A. Clausen
Ryland Deinert
KLASS LAW FIRM, L.L.P.
Mayfair Center, Upper Level
4280 Sergeant Road, Suite 290
Sioux City, IA 51106

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PRELIMINARY STATEMENT

Appellants Dorothy Smizer, individually, and in her capacity as the personal representative of the estate of Harlan Smizer, deceased, will be referred to as "the Smizers." Appellee Christina Drey will be referred to as "Drey." References to the settled record will be designated as "R."

JURISDICTIONAL STATEMENT

The Smizers respectfully appeal from the order granting sanctions under SDCL 15-6-11(b) signed by the Honorable Kathleen F. Trandahl and filed with the clerk of courts in Gregory County, Sixth Judicial Circuit, on July 25, 2014. Drey served her notice of entry of order on August 4, 2014. (R. 518-19). The Smizers timely filed their notice of appeal on August 22, 2014. (R. 528-29). This Court has jurisdiction under SDCL 15-26A-3(7) and 15-26A-7.

REQUEST FOR ORAL ARGUMENT

The Smizers respectfully request the privilege of appearing before this Court for oral argument.

STATEMENT OF THE ISSUES

I. Does the fact that Drey routinely drove over twenty miles an hour over the speed limit on a gravel road through an obstructed view intersection with a yield sign support the Smizers' claim that Drey acted intentionally or recklessly?

Yes. The trial court held that the Smizers had neither factual nor legal support for their claim of punitive damages against Drey, granting sanctions against the Smizers and their counsel under SDCL 15-6-11(b). Numerous facts, however, support the Smizers' claim that Drey acted intentionally or recklessly. The trial court abused its discretion by failing to acknowledge those facts.

- SDCL 15-6-11(b)
- SDCL 21-1-4.1
- *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752 (S.D. 1994)
- *Pioneer Bank & Trust v. Reunick, 20*09 SD 3, ¶ 15, 760 N.W.2d 139

II. Did the trial court abuse its discretion by allowing Drey to alter her testimony, by failing to make factual inferences in the Smizers favor, by making numerous inferences in Drey's favor, by ignoring facts supporting the Smizers' punitive damages claim, by ignoring similar precedence from other states, and by applying an outdated requirement that punitive damages need to be supported by evidence that Drey intended to harm the Smizers?

Yes. The trial court abused its discretion in several distinct ways. The trial court impermissibly allowed Drey to rely on affidavit testimony that contradicted her prior deposition testimony. The trial court also improperly made inferences in Drey's favor and failed to make inferences in the Smizers' favor. The trial court ignored precedence from other jurisdictions that found a reasonable basis for punitive damages under similar facts. Finally, the trial court abused its discretion by attempting to insert a requirement that the Smizers needed to prove that Drey intended to harm them.

- SDCL 15-6-11(b)
- *Pioneer Bank & Trust v. Reunick*, 2009 SD 3, ¶ 15, 760 N.W.2d 139
- *Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953 (D. Kan. 1986)
- *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004)
- *Dame v. Estes*, 233 Miss. 315, 101 So. 2d 644 (1958)

STATEMENT OF THE CASE

Plaintiffs Dorothy and Harlan Smizer ("the Smizers") brought this action against Defendant Christina Drey ("Drey") for compensatory and punitive damages because Drey failed to yield at an intersection near Burke, South Dakota, causing a severe collision with them. (R. 2-7). Drey filed her answer denying she was negligent. (R. 11-15). The parties subsequently stipulated to a transfer of venue from Clay to Gregory County Circuit Court, Sixth Judicial Circuit, on December 13, 2012. (R. 16).

On January 13, 2014, Drey filed a motion for sanctions under SDCL 15-6-11(b). (R. 96). After the matter was briefed, a hearing was held before the Honorable Kathleen F. Trandahl on February 11, 2014. (R. 154, 532-591). On May 24, 2014, the trial court issued its memorandum decision granting Drey's motion for Rule 11 sanctions. (R. 481-94). The trial court's order was entered on July 25, 2014. (R. 516-17).

This appeal followed.

STATEMENT OF THE FACTS

On the morning of July 25, 2010, the Smizers left their home with their daughter and granddaughter and headed to church. (R. 250). At roughly the same time, Drey started driving from her family's house east of Burke. (R. 263). Drey was heading into Burke to pick up her boyfriend and then meet up with others. (R. 263).

There is only one access road to or from Drey's house. (R. 263). That road is 294th Street. (R. 263). Less than a mile away, 294th Street intersects with 347th Avenue. (R. 263, 273). There is a yield sign on 294th Street that requires traffic on 294th Street to yield to traffic on 347th Avenue. (R. 266). Drey knew about the yield sign because it has been at that intersection for a number of years. (R. 268). Drey admitted knowing that

failing to yield at the intersection could be dangerous. (R. 269) ("Q. And you knew at the time that it was dangerous to pull out at a yield sign in front of approaching traffic, correct? A. Yes.").

Drey also knew she needed to ensure that the intersection of 294th Street and 347th Avenue was clear *before* she entered it:

> Q. And you knew that it was your obligation at the time of this collision to make sure that it was 100 percent clear before pulling out at that yield sign, correct?
>
> A. Yes.

(R. 269). Likewise, Drey knew the yield sign meant she needed to be able to come to a complete stop *before* entering the intersection:

> Q. And, you knew that if there was a vehicle coming, it was your obligation to be able to come to a complete stop to be able to allow [traffic] to pass through the intersection.
>
> A. Yes.

(R. 268, 269). 294th Street is a gravel road; Drey admitted she knew it would take longer for her to stop with the gravel. (R. 269) ("Q. And you knew that driving on a gravel road it takes you longer to come to a stop, true? A. Yes.").

It is undisputed that Drey's view of oncoming traffic on 347th Avenue was obstructed by a corn field next to the road. (R. 302-03, 328). Thus, the speed limit for Drey as she approached the intersection was 15 miles per hour. SDCL 32-25-15; (R. 486). It is also undisputed that Drey approached and entered the obstructed intersection at no less than thirty-five miles per hour. (R. 352). ("Q. About how fast do you think that you were going when you first saw the Smizer's car? A. 35."). Drey admitted that she *always* entered that intersection at roughly the same speed:

Q. So would it be fair to say that the speed that you were driving on the day of the collision as you approached within a couple car lengths was about the speed that you would typically drive as you got up to that intersection?

A. Yes.

(R. 265, 269). *See also* (R. 352-53) ("[Drey] testified that the speed she was driving on the day of the collision as she approached within a couple car lengths [of the intersection] was about the speed that she would typically drive as she got up to the intersection. Response: Admit."). Even so, the Smizers didn't think Drey slowed down at all:

Q. Did [Drey] ever tell you how fast she was going?

A. No. But I saw by the police report she said 35, but she was coming full speed.

(R. 250).

It is similarly undisputed that Drey failed to see the Smizers until she was less than two car lengths from them. (R. 264, 352) ("Q. And how far or how close from the intersection do you think you were when you first saw the Smizer's vehicle coming on your right? A. Almost right at the intersection. Q. Okay. So within probably, what, a couple of car lengths or so? A. Not even."). Drey was unable to see the Smizers because her view was blocked. (R. 305) ("Q. And why were you not able to see the Smizer's vehicle sooner than that? A. Because of the corn."). Drey also admitted in her deposition that she didn't check for traffic as she approached the intersection:

Q. What were you doing in the car as you approached the intersection where this collision occurred?

A. Looking straight ahead.

(R. 264, 352). Drey's counsel later tried to alter her deposition testimony in an affidavit, but Drey did not dispute the accuracy of her original statement.

Drey and the Smizers entered the intersection simultaneously. (R. 265). Drey rammed into the side of the Smizers' car, just behind the driver's side door. (R. 253, 275, 277). The collision spun the Smizers' vehicle around, causing it to strike a mailbox and propelling it into the yield sign on the other side of the road. (R. 250, 273). Drey hit the Smizers with enough force to take the tires off of the rims of the Smizers' car on the front driver and back passenger sides. (R. 250, 277).

In fact, the force of the collision was so strong it ruptured the Smizers' daughter's intestines when the car's seatbelt restrained her. (R. 250). Dorothy Smizer suffered whiplash and injuries to her back and right leg. (R. 252). These injuries continue to bother Dorothy to this day. (R. 253).

Harlan Smizer's injuries, however, were worse than Dorothy's. Harlan suffered constant and debilitating headaches after the collision. (R. 257, 258) ("Q. So for two and half years Harlan was having headaches every day? A. Three and a half years. When he was in the hospital this last time every doctor that would come in he'd try to see if he could get some help with his headache."). As a result of the headaches, Harlan's personality changed. (R. 257). The headaches also stopped him from working around the family farm – something he enjoyed immensely. (R. 257). Harlan's headaches continued up to the day he died. (R. 259).

Drey was cited for "Failure to Yield" in violation of SDCL 32-29-3, a Class 2 misdemeanor, and she pled guilty to that charge. Drey admitted to her insurance carrier that she failed to yield at the intersection. (R. 482).

Drey's collision with the Smizers wasn't the only time she failed to yield at that intersection, however. As she stated at her deposition, Drey approached the intersection

on the day of the collision as she would any other day. Drey's driving pattern resulted in a near miss between Drey and another vehicle. In a separate 2010 instance, Drey narrowly avoided a collision with Kiley Klein and her mother, Karen, at that same intersection. (R. 279-80). Like here, Drey was travelling at an excessive rate of speed. (R. 279-80). Like here, Drey failed to yield at the intersection. (R. 279-80). Like here, Drey didn't check for oncoming traffic. (R. 279-80). Like here, Drey gave no indication that she had any intention of stopping for oncoming traffic. (R. 279-80).

STANDARD OF REVIEW

This appeal stems from the trial court's decision to sanction the Smizers under SDCL 15-6-11(b) (Rule 11) for their request for punitive damages against Drey.

The standard of review for Rule 11 sanctions appears inconsistent. On one hand, "[u]nder SDCL 15-6-11(e), appeals pursuant to SDCL 15-6-11(a) through 15-6-11(d) are considered 'without any presumption of the correctness of the trial court's findings of fact and conclusions of law.'" *Hobart v. Ferebee*, 2009 SD 101, ¶ 10, 776 N.W.2d 67. On the other hand, "[a]ppeals under 'Rule 11 … are reviewed under an abuse of discretion standard." *Hahne v. Burr*, 2005 SD 108, ¶ 22, 705 N.W.2d 867. Regardless, a trial court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *NAACP v. Atkins*, 908 F.2d 336, 339 (8th Cir. 1990) (quoting *Cooter & Gell v. Hartmarx Corp., 49*6 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)).

"It is an attorney's duty under SDCL 15-6-11(a) to conduct a 'reasonable inquiry' into the facts and law prior to commencing any action." *Anderson v. Prod. Credit Ass'n*, 482 N.W.2d 642, 645 (S.D. 1992). "The rule is not intended to chill an attorney's

enthusiasm or creativity in pursuing factual or legal theories." *See* Fed. R. Civ. P. 11, Advisory Committee notes to 1983 Amendment.

"Simply because a claim or defense is adjudged to be without merit does not mean that it is frivolous." *Ridley v. Lawrence Cnty. Comm'n*, 2000 SD 143, ¶ 14, 619 N.W.2d 254, 259. Similarly, the test for frivolity does not include "legitimate attempts to establish a new theory of law, or good-faith efforts to extend, modify, or reverse existing law." *Hartman v. Wood*, 436 N.W.2d 854, 857 (S.D. 1989). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

An action is "frivolous" if, and only if, "the proponent can present no rational argument based on the evidence or law in support of the claim [such that] no reasonable person could expect a favorable judicial ruling." *Pioneer Bank & Trust, 20*09 SD 3, 760 N.W.2d 139, 760 N.W.2d 139. In other words, a frivolous legal position must be one "so wholly without merit as to be ridiculous." *Id.*

ARGUMENT

I. THE SMIZERS' PUNITIVE DAMAGES CLAIM AGAINST DREY WAS FACTUALLY AND LEGALLY SUPPORTED. IT SHOULD BE REINSTATED.

The trial court granted Drey's motion for sanctions under Rule 11 because it stated the Smizers had no factual or legal support for their claim of punitive damages against Drey. The trial court's determination was incorrect and should be reversed. Ample evidence and legal precedence supported the Smizers' claim for punitive damages against Drey.

A. Punitive damages are warranted in negligence cases where a defendant acts either willfully or wantonly.

SDCL 21-3-2 sets the standard for punitive damages in South Dakota:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed…, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

"Since the statute is in the disjunctive, it is only necessary to prove one of the three." *Biegler v. Am. Family Mut. Ins. Co.*, 621 N.W.2d 592, 605 (S.D. 2001).

1. Punitive damages require either actual or presumed malice.

"Malice is an essential element of a claim for punitive damages." *Kjerstad v. Ravellette Publ'ns*, 517 N.W.2d 419, 425 (S.D. 1994). Malice may be actual or presumed. *Holmes v. Wegman Oil Co.*, 492 N.W.2d 107, 112, 13 (S.D. 1992). Actual malice is a positive state of mind, evidenced by the desire and intention to injure another, actuated by hatred or ill will towards that person. *Dahl v. Sittner*, 474 N.W.2d 897, 900 (S.D. 1991). Presumed or legal malice is malice which the law infers from or imputes to

certain acts. *Id.* Legal malice need not be motivated by hatred or ill will. *Biegler*, 621 N.W.2d at 605.

2. A reckless disregard for the rights of others or criminal indifference to one's civil obligations demonstrates malice.

"A claim for presumed malice can be shown by demonstrating a disregard for the rights of others." *Isaac*, 522 N.W.2d at 761 (citations omitted); *Case v. Murdock*, 488 N.W.2d 885, 891 (S.D. 1992). A claim for presumed malice can also be shown if the act complained of "was conceived in the spirit of mischief or criminal indifference to civil obligations." *Biegler*, 621 N.W.2d at 605 (citation omitted). In other words, a defendant is liable for punitive damages if she acts with "reckless disregard of the rights of the plaintiff." *Till v. Bennett*, 281 N.W.2d 276, 279 (S.D. 1979); *Case*, 488 N.W.2d at 891.

B. Numerous facts support the Smizers' claim that Drey recklessly disregarded their rights or that Drey acted with a criminal indifference to her civil obligations.

The trial court claimed that "[t]here is no evidence whatsoever that supports a claim for punitive damages." (R. 492). That statement is incorrect. SDCL 15-6-11(b) only requires that the resisting party demonstrate it had some sort of rational basis for their claim. The Smizers, however, exceeded that baseline and demonstrated numerous undisputed and disputed facts showing that Drey acted intentionally, recklessly, or, at a minimum, with a "reckless disregard for the rights of the" Smizers. *Till*, 281 N.W.2d at 279; *Case*, 488 N.W.2d at 891.

1. Numerous undisputed facts support the Smizers' punitive damages claim against Drey.

Despite the trial court's claim that the Smizers provided no facts that would support a claim of punitive damages against Drey, many of the facts the Smizers

provided were undisputed. For whatever reason, the trial court chose to omit them from its decision:

- Drey knew about the yield sign because she traveled through the intersection of 294th Street and 347th Avenue "countless" times. (R. 265) ("Q. I assume that you've driven through that intersection probably countless times, haven't you? A. Yes.").

- The yield sign had been at the intersection of 294th Street and 347th Avenue for quite some time. (R. 268, 351) ("The yield sign at the intersection of 294th Street and 347th Avenue had been there for quite some time. Response: Admit.").

- Drey knew it would be dangerous to pull out in front of approaching traffic at the intersection. (R. 269, 352) ("Defendant knew that pulling into traffic at an intersection controlled by a yield sign could be dangerous. Response: Admit.").

- Drey knew that, with the yield sign, she had to be able to allow traffic on 347th Avenue to pass through the intersection, even if she had to come to a complete stop to do so. (R. 268, 352) ("Q. Do you also understand a yield sign to mean that if there is somebody coming, that you have to be able to stop for them to allow them to pass through the intersection? A. Yes.").

- Drey knew that, because she was on gravel, it would take her longer to stop than on a normal road. (R. 268) ("Q. And you knew that driving on a gravel road it takes you longer to come to a stop, true? A. Yes.").

- Drey had an obscured view of oncoming traffic due to a cornfield next to the road. (R. 328) ("The intersection of the accident contained an obstructed view due to the location of the corn field.").

- Because Drey's view was obscured, the speed limit was 15 miles per hour as Drey approached the intersection. SDCL 32-25-15.

- Drey, however, approached the intersection at no less than thirty-five miles per hour. (R. 352) ("Defendant entered the intersection of 294th Street and 347th Avenue at no less than thirty-five miles per hour. Response: Admit….").[1]

[1] The Smizers claim that Drey was going faster than thirty-five miles per hour. As Dorothy Smizer testified at her deposition, the Smizers did not believe that Drey slowed

- Drey regularly entered the intersection going no less than thirty-five miles per hour. (R. 269, 352-53) ("Defendant testified that the speed she was driving on the day of the collision as she approached within a couple car lengths was about the speed that she would typically drive as she got up to the intersection. Response: Admit.").

- Drey received a citation for failing to yield to the Smizers and pled guilty and paid the fine. (R. 482).

- Drey narrowly avoided a collision with another vehicle at the same intersection before causing the collision with the Smizers. (R. 279-80).

2. Numerous disputed facts support the Smizers' claim of punitive damages against Drey.

There are also facts that the parties dispute which support a punitive damages claim against Drey. For example Drey admitted at her deposition that as she approached the intersection, she was looking straight ahead rather than checking for traffic:

> Q. What were you doing in the car as you approached the intersection where this collision occurred?
>
> A. Looking straight ahead.

(R. 264, 352). Drey later attempted to change her testimony by submitting an affidavit claiming that she had checked for traffic but couldn't see any. (R. 348). Curiously, she never mentioned this at her deposition. Drey then went so far as to accuse Smizers' counsel of attempting to mislead the Court with that statement. Drey's counsel, however, was at the deposition. He heard Smizers' counsel's questions. Drey's counsel could have objected. Drey's counsel could have followed up with his own questions if he

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down at all as she approached the intersection. (R. 250). Nonetheless, it is undisputed that Drey was traveling no slower than *20 miles over the speed limit* as she approached an obscured view intersection.

didn't think that Drey's answer was complete. Drey's counsel chose to do none of those things.

Instead, Drey waited until after the Smizers filed a motion for partial summary judgment on the issue of punitive damages to try and change Drey's testimony. Drey's affidavit, however, should have been rejected by the trial court because "a party cannot assert a better version of the facts than her prior testimony." *St. Pierre v. State ex rel. S.D. Real Estate Comm'n*, 2012 SD 25, ¶ 24, 813 N.W.2d 151 (citations omitted). Likewise, a party "cannot claim a material issue of fact which assumes a conclusion contrary to her own testimony." *Id.* Furthermore, as the non-moving party, the trial court was required to view the facts in a light most favorable to the Smizers. *Nationwide Mut. Ins. Co. v. Barton Solvents, Inc.*, 2014 SD 70, ¶ 10, 855 N.W.2d 145, 855 N.W.2d 145 ("We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party."). Additionally, even if both parties state that there are no disputes of material fact, if the "undisputed facts are such that reasonable minds might differ in interpreting them in arriving at different conclusions on whether the defendant was willful, wanton, or reckless," the question of punitive damages should be sent to the jury. *Gabriel v. Bauman*, 2014 SD 30, ¶ 15, 847 N.W.2d 537. Nonetheless, the trial court not only allowed Drey to completely change her testimony, it disregarded Drey's unequivocal deposition testimony. (R. 489) ("Drey testified that she looked for traffic, but that her vision was blocked by a corn field.").[2]

[2] The trial court made no citation to the record for this factual finding, so the Smizers presume it came from Drey's later affidavit since this version does not appear anywhere else in the record and because the trial court cited Drey's later affidavit for the next sentence.

Ultimately, numerous facts would support the Smizers' claim that Drey acted intentionally or recklessly. The fact that Drey pled guilty to her Failure to Yield violation shows a criminal indifference to her civil obligations. Either way, the facts support the Smizers punitive damages claim against Drey, and it should be reinstated.

C. Ample legal precedence supports the Smizers' punitive damages claim against Drey.

The Smizers' legal argument is supported by precedence in both South Dakota and in other jurisdictions. Neither the trial court nor Drey provided a *single* case where the Smizers' legal theory was rejected, much less sanctioned under Rule 11.

1. Drey's conduct is consistent with previous South Dakota punitive damages precedence.

This Court has repeatedly held that punitive damages are warranted if a defendant "demonstrated a conscious disregard for the rights" of other motorists. *Flockhart v. Wyant*, 467 N.W.2d 473, 478 (S.D. 1991); *see also Berry v. Risdall*, 576 N.W.2d 1, 9-10 (S.D. 1998) (holding that evidence supported jury instruction on punitive damages where motorist consciously chose to drink four or more drinks in less than two hours before operating vehicle and admitted he was aware of the dangers of driving while under the influence). Additionally, imposing punitive damages under a theory of presumed malice is well established in South Dakota. In *Boomsma v. Dakota, Minnesota & Eastern R.R. Corp.*, this Court held that allegations that a railroad corporation failed to follow its established procedures of flagging a blocked intersection at night, or use its train whistle or flares to mark a flatbed railroad car at the crossing, was sufficient to submit the issue of punitive damages to the jury. 651 N.W.2d 238, 246 (S.D. 2002). In *Biegler v. American Family*, this Court held that an insurance company's denial of coverage and

refusal to defend despite its knowledge of a duty to do so supported a claim for punitive damages. 621 N.W.2d 592, 605 (S.D. 2001). Similarly, in *Harter v. Plains Ins. Co., Inc.*, this Court held that presumed malice was demonstrated by, among other things, an insurance company's conditioning of an offer of policy limits on a release of a bad faith claim that had accrued. 579 N.W.2d 625, 634 (S.D. 1998).

In *Warner v. Youth Services Int'l of S.D., Inc.*, a United States District Court case, Chief Judge Piersol held that the alleged failure of a residential treatment facility for troubled juveniles to investigate students' complaints regarding sexual assaults by its counselors could constitute willful, wanton or malicious conduct. 89 F. Supp. 2d 1095, 1107 (D.S.D. 2000). In *Schuldies v. Millar*, this Court held that a refusal to release property rightfully belonging to another supported a claim for presumed malice and punitive damages. 555 N.W.2d 90, 99-100 (S.D. 1996). In *Kjerstad v. Ravellette Publications, Inc.*, this Court held that a group of employees' claims for punitive damages against their corporate employer were properly submitted to the jury on the basis of presumed malice where they were spied upon when using the restroom. 517 N.W.2d at 425. In *Holmes v. Wegman Oil Co.*, this Court held that a claim for punitive damages based upon presumed malice was properly submitted to the jury where a corporation knew of the potential danger associated with one of its products but failed to act promptly to recall or correct it. 492 N.W.2d at 112-13. In *Till v. Bennett*, this Court allowed the jury to consider a punitive damages award for allowing cattle to trespass on a neighbor's land. 281 N.W.2d at 279. All of these cases support Smizers' claim for punitive damages under the facts of this case.

2. This Court has only denied punitive damages in failure to yield cases when the defendant had a reasonable belief that oncoming traffic would yield.

It appears there is only one case in South Dakota discussing willful or wanton conduct in a failure to yield context. There, this Court failed to find willful or wanton conduct because the defendant had a reasonable belief that oncoming traffic would yield to him.

In *Gabriel v. Bauman*, the plaintiff sought compensation for injuries he sustained when he was hit by a volunteer firefighter. 2014 SD 30, 847 N.W.2d 537. At the time, the defendant firefighter was acting in his official capacity. As a result, immunity applied. *Id.* ¶ 4. In order to overcome immunity, the plaintiff needed to prove that the firefighter acted willfully or wantonly when he hit the plaintiff's vehicle. *Id.*

This Court, in denying the plaintiff's claim, relied heavily on the fact that the firefighter had a reasonable belief that the plaintiff would yield to him:

> Taken in a light most favorable to Gabriel, the facts of this case show that Bauman was speeding to the fire station with his hazard lights engaged. Bauman saw that Gabriel's vehicle intended to turn, but *Bauman had the right of way and he did not think Gabriel's vehicle was going to turn in front of him.* Despite an unobstructed view of Bauman's oncoming vehicle for approximately 887 feet, Gabriel turned in front of Bauman. Bauman attempted to avoid the accident, but was unable to stop in time.

Id. ¶ 18.

The *Gabriel* case accurately distinguishes the line between behavior warranting punitive damages and behavior not warranting punitive damages. Although the firefighter defendant in *Gabriel* knew that the plaintiff intended to turn onto his road and he had an unobstructed view of the plaintiff's vehicle, the firefighter knew he had the

right of way. Additionally, even though the firefighter was speeding, this Court found it wasn't reckless, given the context.

The facts of this case, however, are markedly different. Here, Drey knew that she had an obstructed view of oncoming traffic. Drey knew she couldn't see the oncoming traffic until she was practically on top of them. Drey also knew she did not have the right of way. She knew she was supposed to yield to oncoming traffic. Drey knew the yield sign was at that intersection to prevent the very kind of collision she caused. And it is undisputed Drey approached the intersection at no slower than thirty-five miles per hour on a gravel road which would make it more difficult for her to yield to oncoming traffic. It is a disputed fact whether she even slowed down. Drey admitted she didn't see the Smizers until it was too late for her to stop. It is a disputed fact whether she even checked for oncoming traffic.

This case provides an excellent counterpoint to the facts in *Gabriel*. Taken together, they illustrate the difference between non-reckless behavior (Gabriel) and reckless behavior (Drey). Drey's speeding was undeniably more reckless because Drey had a yield sign and an obstructed view, which meant that she had no idea whether there was oncoming traffic. That is why the legislature set the speed limit for such intersections at fifteen miles per hour. Drey's actions showed a reckless disregard of the Smizers' rights and a criminal indifference to Drey's civil obligations to slow, to check for traffic, and to yield to oncoming drivers.

3. Other Courts have allowed punitive damages under similar facts.

Other courts, when confronted with similar facts, have allowed punitive damages against defendants like Drey. For example, in upholding a punitive damages verdict against a defendant who was cited for the same offense as Drey, the Montana Supreme Court noted that "[w]hen a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages on the basis of presumed malice." *Eliason v. Wallace*, 209 Mont. 358, 363, 680 P.2d 573, 575-76 (1984). Smizers cited this case, but the trial court chose not to even reference it.

South Carolina also has a long-standing doctrine addressing punitive damages in cases involving statutory violations like Drey's. The South Carolina standard for punitive damages is similar to South Dakota's. *See Fairchild v. S.C. DOT*, 385 S.C. 344, 354, 683 S.E.2d 818, 823 (Ct. App. 2009) ("A plaintiff is entitled to punitive damages if the act complained of is determined to be willful, wanton or reckless"). In South Carolina, it is a "well settled rule that a showing of statutory violation can be evidence of recklessness and willfulness." *Id.* (other citations omitted). Like Montana, "[a] factual question as to punitive damages is presented when there is evidence of a statutory violation." *Id.* The Smizers cited these cases also, which the trial court ignored.

In *Austin v. Secialty Transp. Servs.*, the South Carolina Supreme Court upheld a punitive damages verdict against a driver who failed to yield to oncoming traffic. 358

S.C. 298, 594 S.E.2d 867. It allowed the verdict to stand because the defendant's violation of the safety statute "constitutes negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury." *Id.* at 314-15, 594 S.E.2d 867. Smizers cited this case to the trial court. Like the rest of the case law cited by the Smizers, the trial court disregarded it.

The Mississippi Supreme Court addressed actions by a defendant very similar to Drey's in *Dame v. Estes*. 233 Miss. 315, 101 So. 2d 644. Like South Dakota, Mississippi imposes punitive damages when a defendant acts with actual or presumed malice. *Id.* at 317-18, 101 So. 2d 644 ("Punitive damages may be recovered not only for a willful and unintentional wrong but for such gross and reckless neglect as is equivalent to such a wrong, since an act done in a spirit of wantonness and reckless is oftentimes just as harmful as if promoted by malice."). The Supreme Court reversed the trial court's decision to not submit the question of punitive damages to the jury:

> It is undisputed that the appellee either ignored or wholly failed to see the stop sign which was staring her in the face and made no effort to stop at the intersection or to even check the speed of the automobile she was driving. It was broad-open daylight, there was nothing to obscure her vision, and she wholly failed to see the appellant's pickup truck until it was directly in front of her; and we think that under the whole record in this case the question of whether the plaintiff was entitled to recover punitive damages should have been submitted to the jury, and that consequently the lower court erred in refusing the plaintiff's requested instruction on punitive damages and in granting to the defendant the instruction telling the jury that they could not award any punitive damages to the plaintiff.

Id. at 318-19, 101 So. 2d 644. Smizers cited this case but it, too, was ignored.

Conversely, when courts reject punitive damages for failure to yield cases, they typically do so because the evidence indicates that the defendant had no idea that there was a sign or signal controlling the intersection. *See, e.g.*, *Wimbley v. Mathis*, Civil No.

4:93CV208-B-D, 1994 U.S. Dist. LEXIS 21200, 1994 WL 1890940 (N.D. Miss. Dec. 27, 1994) (where the defendant failed to see flashing lights on a stop sign); *Hayes v. Xerox Corp.*, 718 P.2d 929 (Alaska 1986) (finding that because the defendant didn't see the traffic light, he didn't operate his vehicle with sufficient intention of exposing others of risk to harm to warrant punitive damages). The trial court made no effort to reconcile the existing case law for punitive damages in failure to yield cases. It merely asserted that the Smizers' position was unsupported. In making that assertion, however, the trial court abused its discretion.

D. The Smizers provided a rational argument that Drey acted willfully or wantonly, meeting their Rule 11 burden.

Rule 11 only requires that litigants have a "rational argument" in favor of their claim. *Pioneer Bank & Trust, 20*09 SD 3, 760 N.W.2d 139, 760 N.W.2d 139. The Smizers had more than simply a rational argument. The Smizers presented numerous facts that a jury could reasonably interpret to mean that Drey had no intention of yielding or recklessly failed to yield to oncoming traffic on the morning of the collision. The Smizers also presented legal precedence from numerous other jurisdictions where punitive damages were upheld under similar facts. These jurisdictions all had standards for punitive damages similar to those in South Dakota. Ultimately, the Smizers exceeded the minimum requirements laid out under Rule 11 for their punitive damages claim against Drey.

II. THE TRIAL COURT ABUSED ITS DISCRETION THROUGH MULTIPLE FACTUAL AND LEGAL ERRORS.

The trial court based its decision to award Rule 11 sanctions against the Smizers primarily because this Court has never previously allowed punitive damages in a failure

to yield case. That, however, is not the standard for Rule 11 sanctions. As this Court previously noted, legitimate attempts to "establish a new theory of law, or good-faith efforts to extend, modify, or reverse existing law" are not frivolous. *Hartman*, 436 N.W.2d at 857. In particular, Rule 11 was never intended "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Fed. R. Civ. P. 11, Notes of Advisory Committee on 1983 amendment. The trial court's grant of Rule 11 sanctions, however, is factually and legally erroneous and will have a chilling effect on future litigants. It should be reversed.

A. The trial court made numerous factual errors in its memorandum decision.

1. The trial court incorrectly stated that the Smizers agreed that Drey didn't purposely fail to yield.

In its memorandum decision, the trial court found that "[the Smizers] agree that Drey did not … purposely failed to yield…." (R.489). The trial court cited to Dorothy Smizer's deposition in support of this factual finding.

The trial court's finding, however, is incorrect. The trial court ignored the fact that Dorothy Smizer answered several times in her deposition that she believed Drey had no intention of stopping:

> Q. You don't contend that [Drey] intentionally hit your car though, do you?
>
> A. Well, she intentionally did not yield.
>
> …
>
> Q. Did [Drey] try to hit your car ma'am?
>
> A. She did not yield. She did not plan to yield.

(R. 251). The only concession Dorothy Smizer made, which the trial court seized upon, was that she did not believe that Drey intended to hurt her or Harlan. (R. 143). Drey's counsel even conceded that he was only trying to clarify whether Dorothy thought that Drey intended to harm them:

> Q. So you don't believe [Drey] tried to hurt you on purpose; is that right?
>
> A. No. She didn't try to hurt us on purpose, no. No one would try that.
>
> Q. That's all I was asking.

(R. 143).

The trial court erred in several other ways. First, it failed to note that the Smizers' counsel objected to the testimony it cited. In fact, Dorothy Smizer's counsel objected that the line of questioning was asked and answered. An objection for asked and answered requires the court to disregard the objected to testimony. *See, e.g.*, *State v. Younger*, 453 N.W.2d 834, 839-40 (S.D. 1990) (noting that the trial court ordered that testimony objected to by an asked and answered objection be disregarded). Drey's counsel asked earlier in Dorothy Smizer's deposition whether Drey didn't intend to yield. Dorothy Smizer responded that Drey did not intend to yield at the intersection. (R. 251). Assuming, *arguendo*, that Drey's counsel's questioning stood for the proposition the trial court contended, because those questions were a reiteration of previously-asked questions, they should have been disregarded.

Second, the cited testimony does not stand for the factual conclusion the trial court contended. At the top of the cited page, Dorothy Smizer unequivocally stated that she believed Drey had no intention of stopping:

A. I just think that she – she had no intentions of stopping. I mean, I really don't think she did. She was going too fast.

(R. 143). Although Drey's counsel asked whether Drey intended to hit hurt the Smizers, Drey's counsel never got Dorothy Smizer to agree that she didn't think that Drey purposely failed to yield, as the trial court stated. The trial court abused its discretion when it clearly erred on that fact.

2. The trial court incorrectly stated the speed limit as Drey approached the intersection.

The trial court also stated that "[Drey] was traveling on a road with a posted speed limit of 65 miles per hour, and she was traveling at 45 miles per hour prior to slowing down for the yield sign." (R. 489). The trial court completely failed to acknowledge that the speed limit changed as Drey approached the obstructed intersection. It is undisputed that Drey was approaching an intersection with both a yield sign and an obscured view. (R. 268, 328, 351). SDCL 32-25-15 controls the speed limit for intersections with obscured views:

> **32-25-15. Speed limit at intersections with obstructed view – Violation as misdemeanor.** *When approaching within fifty feet of and when traversing an intersection of highways when the driver's view is obstructed the maximum lawful speed shall be fifteen miles per hour.* A driver's view is obstructed if at any time during the last fifty feet of his approach to such intersection, he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of two hundred feet from such intersection. A violation of this section is a Class 2 misdemeanor.

It is undisputed that Drey was traveling at least thirty-five miles per hour as she approached and entered the intersection. (R. 352). Thus the trial court erred because instead of finding that Drey was traveling twenty miles *over* the speed limit as she approached and entered the intersection, it found that she was going twenty miles *under*

the speed limit. Coincidentally, this Court recently stated that it is conceivable that *speeding without any other contributing factor* could warrant punitive damages. *Gabriel*, 2014 SD 30, ¶ 13, 847 N.W.2d 537.

B. The trial court abused its discretion by making several legal errors in its memorandum decision.

1. The trial court committed legal error by allowing Drey to alter her deposition testimony.

The trial court allowed Drey to alter her deposition testimony so that Drey could take a factual position contradicted by her deposition. This Court, however, has stated that "[a] party cannot assert a better version of the facts than her prior testimony." *St. Pierre*, 2012 SD 25, 813 N.W.2d 151, 813 N.W.2d 151, 813 N.W.2d 151 (citations omitted). The trial court abused its discretion when it failed to enforce that rule here and when it failed to view the evidence in the light most favorable to the Smizers.

Drey testified in her deposition that as she approached the intersection, she was looking straight ahead:

> Q. What were you doing in the car as you approached the intersection where this collision occurred?
>
> A. Looking straight ahead.

(R. 264, 352). Since looking straight ahead and looking to either side for traffic are mutually exclusive, it is a reasonable interpretation that Drey wasn't looking for oncoming traffic as she approached the intersection. That interpretation is further bolstered by the fact that Drey had an obstructed view of oncoming traffic as she approached the intersection. (R. 328).

Drey, however, later attempted to change her testimony. Unsurprisingly, Drey stated that the Smizers' direct quote from her deposition was a "false assertion:"

> 6. Contrary to [the Smizers'] false assertion, I looked both ways for traffic upon approaching and entering the intersection. I unfortunately didn't see the Smizers until a moment before the accident.

(R. 348). Drey tried to bolster her argument by claiming that she had to have looked either way to know her view was obstructed:

> As [the Smizers] are aware, I also testified that there was a corn field to my right which obstructed my view of the intersection. How would I have known that there was a corn field obstructing my view if I didn't look for traffic upon entering the intersection?

(R. 348). Drey, however, didn't need to look to the side to know that her view was obstructed for the same reason that she knew that there was a yield sign there. Drey knew from her prior experience driving through the intersection that the intersection had an obstructed view and had a yield sign. Such facts do not warrant the inference that Drey requested and the Court allowed.

If anything, Drey's argument lends credence to the Smizers' interpretation of Drey's behavior that day. Drey didn't look either way because she knew she couldn't see oncoming traffic until she was within the intersection. Since Drey was driving no slower than thirty-five miles per hour on a gravel road within twenty feet of the intersection, it stands to reason that she had no intention of checking for oncoming traffic; she was merely gambling that nobody was there.

The trial court should have accepted the Smizers' interpretation that Drey was looking "straight ahead" as she approached the intersection. (R. 268). Instead, the court accepted Drey's changed testimony, which was elicited months later, when her counsel had ample time to craft facts that matched Drey's arguments. That is precisely why this Court stated that "[a] party cannot assert a better version of the facts than her prior

testimony." *Id.* ¶ 24. Absent such a rule, every litigant would contradict any admission by submitting new affidavits with contradictory factual statements.

At most, the trial court should have noted that there was a dispute of material fact over whether Drey checked for oncoming traffic. Instead, the trial court accepted Drey's version of events and rejected the Smizers' interpretation:

> Drey testified at her deposition that she was prevented from seeing the car the Smizer [sic] were traveling in because of a corn field on her right. The context of her testimony was that she checked for traffic, but couldn't see Smizers' vehicle until it was too late because the intersection had an obstructed view. Drey has specifically denies [sic] she entered the intersection without looking either way for traffic. Drey contends she looked both ways for traffic upon approaching and entering the intersection.

(R. 483).

The trial court abused its discretion numerous times. The trial court allowed Drey to alter her testimony to fit the story her counsel wanted to tell. The trial court failed to find that there was a dispute of material fact over whether Drey checked for oncoming traffic. The trial court failed to acknowledge that reasonable minds could find that the Smizers' interpretation of the facts were reasonable. Instead, the trial court interpreted numerous facts in Drey's favor. These abuses of discretion, individually or collectively, require reversal of the trial court's decision.

2. The trial court committed legal error by inferring other facts in Drey's favor instead of the Smizers'.

A trial court is required to view evidence "most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party." *Englund v. Vital*, 2013 SD 71, ¶ 9, 838 N.W.2d 621. The standard under Rule 11 is even more deferential to the nonmoving party. A Rule 11 motion should be denied unless the nonmoving

party's arguments are "so wholly without merit as to be ridiculous." *Pioneer Bank & Trust v. Reunick*, 2009 SD 3, ¶ 15, 760 N.W.2d 139.

i. The trial court improperly interpreted disputed statements attributed to Brad Skalla.

Drey and the trial court's arguments focused primarily on the Smizers' purported "smoking gun" witness, Brad Skalla. Curiously, the Smizers never referred to Brad Skalla as a "smoking gun" witness. That phrase was an invention of Drey's that the trial court adopted. At the time of the hearing, neither Drey nor the Smizers had deposed Mr. Skalla.

There is a question about what exactly Brad Skalla said to Harlan. Drey's counsel elicited an affidavit from Mr. Skalla stating that he didn't remember telling Harlan that Drey previously failed to yield at the intersection. (R. 119) ("I have no memory of ever telling Harlan or Dorothy Smizer that I observed Christina Drey fail to yield at any intersection including the intersection of 347th Avenue and 294th Street in Gregory County, South Dakota."). (R. 492). Dorothy and Harlan, however, remember differently. At the time of Dorothy's deposition, Harlan had already passed away. As a result, Drey's counsel asked Dorothy about what Mr. Skalla told Harlan. (R. 75):

Q. Any other neighbors tell you that they've seen [Drey] fail to yield at that intersection, ma'am?

A. I think they told my husband, not me.

Q. Okay. And who was that?

A. Brad Skalla told Harlan.

…

Q. Okay. And Harlan told you that Brad had told him Chrissy had gone through [the intersection]?

A. Yes, he told me that.

(R. 75). This conversation happened within a couple of months of the collision between Drey and the Smizers. (R. 75). Drey's counsel, however, didn't obtain Skalla's affidavit until after 2013. By then, Skalla could not remember the conversation between him and Harlan. (R. 119). Dorothy and Harlan, however, remembered the conversation very well. (R. 75).

As a preliminary matter, the trial court mistakenly relied, *to the exclusion of the remaining evidence*, on the disputed Skalla testimony. The trial court didn't allow the Smizers access to any of the correspondence between Mr. Skalla and Drey's counsel. The trial court didn't allow the Smizers to depose Mr. Skalla. The trial court also failed to even acknowledge that there was a dispute of material fact over what Mr. Skalla told Harlan Smizer. The trial court failed to acknowledge that Mr. Skalla's memory could have been faulty. The trial court simply accepted as truth an affidavit that Drey's counsel prepared for Mr. Skalla to sign. Worse, the trial court interpreted Mr. Skalla's faulty memory as an affirmative statement of fact that he never told the Smizers about Drey failing to yield at the intersection before.

This Court, however, has previously reversed grants of summary judgment over similar disputes of what witnesses did or did not say. In *Stern Oil Co. v. Brown*, the defendant claimed that the plaintiff "orally guaranteed a five-cent profit on every gallon of fuel he sold." *Stern Oil v. Brown*, 2012 SD 56, ¶ 13, 817 N.W.2d 395. Meanwhile, Stern Oil claimed that "it did not make this guarantee." *Id.*

Even though Stern Oil presented evidence contradicting Brown's claim, this court found that the contradiction created a question of fact. *Id.* ¶ 14. In fact, the majority

rejected the dissent's argument that Brown failed to provide sufficient evidence to allow a dispute of material fact to arise:

> The dissent argues that Brown failed to submit evidence sufficient to support a finding that Brown's reliance upon Stern Oil's alleged misrepresentation was justified. The dissent claims that even if Brown's version of the facts are true, Brown failed to carry this burden, thus making summary judgment appropriate. However, the question of whether Brown's reliance was justified is a question of fact in this case. Brown presented evidence that the retail market in that area was highly competitive. The evidence also demonstrated that Stern Oil set the price. Therefore, there was a factual dispute regarding the justifiable reliance evidence because Brown was not entirely free to choose a retail price for the fuel he sold.

Harlan Smizer stated that Mr. Skalla told him that Drey had failed to yield at that intersection before. Drey's counsel elicited an affidavit that the trial court mistakenly interpreted to reject Harlan Smizer's recollection. The trial court should have acknowledged there was a dispute of material fact over Mr. Skalla's prior statements. Instead, the trial court improperly accepted Drey's *interpretation* of the Skalla affidavit as true with no deference to the Smizers. That is an abuse of discretion.

ii. The trial court improperly rejected the Klein affidavit.

In addition to being improperly deferential to Drey's interpretation of the Skalla affidavit, the trial court also improperly rejected Kiley Klein's affidavit. In fact, the trial court went so far as to say that Ms. Klein's affidavit "does not corroborate anything," even though it was more definite about the facts than the Skalla affidavit. (R. 492).

Ms. Klein's affidavit states that she believed that the following facts were more likely true than not true:

- The Kleins "narrowly averted a serious car collision" with someone they believed to be Drey;
- Drey was driving at an excessive rate of speed at the time;

- Drey failed to obey the yield sign;
- Drey failed to slow for the yield sign;
- Drey didn't appear to have any intention of slowing down or stopping for the yield sign; and,
- The Kleins had to slam on the brakes to avoid being hit by Drey.

(R. 279-80).

Kiley Klein's affidavit shows why Drey's conduct was no mistake. As such, it also exceeds the reasonable basis test for punitive damages discovery. The Smizers produced evidence to support their claim that Drey acted recklessly or with a criminal indifference to her civil obligations. The trial court abused its discretion in rejecting wholesale the Klein affidavit.

3. The trial court improperly interpreted the Smizers' notice regarding possible excess verdict and punitive damages against Drey

The trial court devoted much of its opinion to arguing that the Smizers' letter to Drey's counsel and her insurance company discussing their intransigence at settling within the policy limits was harassing and sent for an improper purpose. (R. 489-93). In fact, it was the largest single section of the trial court's opinion. The trial court, however, failed to appreciate the role that such notice letters play in potential excess verdict claims.

"Ordinarily [in cases involving an excess verdict], the insured would have to prove that had it not been for the breach of duty by the insurance company, the case could have been settled within the policy limit, or at least for a lower amount than the judgment." *R.G. Wegman Constr. Co. v. Admiral Ins. Co.*, 629 F.3d 724, 731 (7th Cir. 2011). Thus, demand letters play an important role in whether the insurance company had notice of a potential excess verdict or punitive damages claim against it:

> Once the third party and his attorney have decided upon a settlement proposal, the attorney should promptly send the insurer a demand letter. This letter deserves great care in its preparation because if the insurer rejects the policy limits settlement offer and the third party, as assignee of the insured's cause of action for bad faith, sues the insurer for rejecting the settlement offer in bad faith, *the policy limits demand letter will be Exhibit A in the third party's case against the insurer.*

Ashley Bad Faith Actions § 10:50.

The Smizers believed that their injuries exceeded Drey's policy limits. Drey's counsel and her insurer refused to consider anything close to her policy limits. In fact, Drey's insurer and counsel offered settlement amounts for *less* than Harlan Smizer's medical bills. The Smizers believed that Drey's insurer's refusal to pay the policy limits in their case was based more on the insurer's financial reasons than on the merits of the Smizers' claims. As such, the Smizers' demand letter, rather than serving an improper purpose, provided the required notice to Drey's insurer that the Smizers would accept Drey's assignment for any excess verdict or punitive damages claim against her. Had the Smizers not done so, Drey's insurer would likely not be liable for any excess verdict or punitive damages the Smizers obtain at trial.

4. The trial court abused its discretion by adding a previously-rejected standard for punitive damages.

The trial court unreasonably blurred the line between actual and presumed malice. In fact, the trial court cited to outdated law from 1903 to claim that punitive damages law requires a showing that the defendant had "a wish to injure another." (R. 488). This Court, however, has rejected that position, stating that malice need not be "motivated by hatred or ill will." *Biegler*, 621 N.W.2d at 605.

The trial court also claimed that "South Dakota is among the states having the most stringent conduct requirement when it comes to punitive damages." (R. 488). The

trial court, however, ignored substantial legal precedence contradicting its contention. That is because almost all states apply the same willful or wanton standard that South Dakota applies. *See, e.g.*, *Fairchild*, 385 S.C. at 354, 683 S.E.2d at 823 ("A plaintiff is entitled to punitive damages if the act complained of is determined to be willful, wanton or reckless"); Ala. Code § 6-11-20(a) ("punitive damages may not be awarded in any civil action…, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."). Indeed, much of the analogous legal precedence the Smizers cited came from states with a standard as rigorous *or greater* than South Dakota's standard for punitive damages.

The trial court also ignored that "[a] claim for presumed malice can be shown by demonstrating a disregard for the rights of others." *Isaac*, 522 N.W.2d at 761 (citations omitted); *Case*, 488 N.W.2d at 891. This standard can be met in several ways not requiring intent to harm. For example, if a defendant acted with "criminal indifference to one's civil obligations," that can form the basis for punitive damages. *Case*, 488 N.W.2d at 891. Ultimately, so long as a defendant acted with "reckless disregard of the rights of the plaintiff," it would be error to reject a claim for punitive damages. *Till*, 281 N.W.2d at 279; *Case*, 488 N.W.2d at 891. The trial court, by attempting to attach an additional *scienter* requirement, abused its discretion.

CONCLUSION

The trial court abused its discretion when it granted Drey's motion for Rule 11 sanctions. The trial court ignored undisputed evidence that a jury could reasonably interpret to conclude that Drey willfully or recklessly failed to yield to the Smizers. The

trial court not only failed to interpret facts in the Smizers' favor, it also improperly interpreted several facts in Drey's favor, instead.

Additionally, the trial court ignored numerous factually similar cases from other jurisdictions with punitive damages standards similar to South Dakota. All of those courts determined that punitive damages were warranted in cases like this. Several of those courts reversed trial courts that, like the trial court here, refused to send the issue of punitive damages to the jury. Perhaps this is why the trial court failed to cite a *single* factually analogous case where punitive damages were not allowed, much less one where the plaintiffs' attorneys were sanctioned under Rule 11.

The trial court legally and factually abused its discretion. Its decision should be reversed.

Dated this 29th day of January, 2015.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Robert D. Trzynka

Michael D. Bornitz
Robert D. Trzynka
PO Box 1400
Sioux Falls, SD 57101-1400
Telephone: (605) 335-4950
Facsimile: (605) 335-4961
MikeB@cutlerlawfirm.com
BobT@cutlerlawfirm.com
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,533 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Robert D. Trzynka
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2015, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 29th day of January, 2015, I sent copies of the foregoing to Appellee's counsel by email and United States Mail, first class postage prepaid, to the following address:

Timothy A. Clausen
Ryland Deinert
KLASS LAW FIRM, L.L.P.
Mayfair Center, Upper Level
4280 Sergeant Road, Suite 290
Sioux City, IA 51106
Clausen@klasslaw.com
deinert@klasslaw.com

/s/ Robert D. Trzynka
One of the attorneys for Appellants

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27192

DOROTHY SMIZER, in her individual capacity and as Personal Representative of the Estate of HARLAN SMIZER, Deceased.

Plaintiffs and Appellants,

v.

CHRISTINA DREY,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
GREGORY COUNTY, SOUTH DAKOTA

THE HONORABLE KATHLEEN F. TRANDAHL
CIRCUIT JUDGE

APPELLEE'S BRIEF

Michael D. Bornitz
Robert D. Trzynka
CUTLER LAW FIRM, LLP
100 North Phillips,
9th Floor
PO Box 1400
Sioux Falls, SD 57101-1400

Ryland Deinert
Timothy A. Clausen
KLASS LAW FIRM, LLP
Mayfair Center, Upper Level
4280 Sergeant Road, Suite 290
Sioux City, IA 51106

Notice of Appeal Filed August 22, 2014.

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PRELIMINARY STATEMENT

Appellants Dorothy Smizer ("Dorothy"), individually, and in her capacity as the personal representative of the estate of Harlan Smizer ("Harlan"), deceased, will be referred to collectively as "the Smizers." Appellee Cristina Drey will be referred to as "Drey." References to the settled record will be designated as "R." References to Appellee's Appendix will be designated as "App." References to Appellants' Brief will be designated as "AB."

JURISDICTIONAL STATEMENT

The Smizers and their counsel appeal from an Order granting sanctions under SDCL § 15-6-11(b), signed by the Honorable Kathleen F. Trandahl, and filed with the Clerk of Courts in Gregory County, Sixth Judicial Circuit, on July 25, 2014. Drey served her Notice of Entry of Order on August 4, 2014. (R. 518-19.) The Smizers and their counsel filed their Notice of Appeal on August 22, 2014. (R. 528-29.) This Court has jurisdiction under SDCL §§ 15-26A-3(7) and 15-26A-7.

REQUEST FOR ORAL ARGUMENT

Drey respectfully requests the honor of appearing before this Court for oral argument.

STATEMENT OF THE ISSUES

I. Did the trial court abuse its discretion by granting Appellee's Amended Motion for Violation of SDCL § 15-6-11(b) because the Appellants and their counsel brought a baseless and frivolous claim for punitive damages?

No. The trial court held that the Smizers and their counsel had neither a factual nor a legal basis for their claim of punitive damages against Drey and granted sanctions against them under SDCL § 15-6-11(b).

- SDCL § 15-6-11(b)
- SDCL § 21-1-4.1
- *Gabriel v. Bauman,* 2014 SD 30, 847 N.W.2d 537
- *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752 (S.D. 1994)
- *Pioneer Bank & Trust v. Reunick,* 2009 SD 3, 760 N.W.2d 139

II. Did the trial court abuse its discretion by granting Appellee's Amended Motion for Violation of SDCL §15-6-11(b) because the Appellants and their counsel utilized their claim of punitive damages for improper purposes?

No. The trial court (after being presented with a lack of evidence to support the Smizers' claim for punitive damages and after being presented with evidence of the Smizers' and their counsel's improper use of their claim for punitive damages) rightfully granted Appellee's Amended Motion for Violation of SDCL §15-6-11(b).

- SDCL § 15-6-11
- *Anderson v. Production Credit Ass'n,* 482 N.W.2d 642, 645 (S.D. 1992)
- *Boone v. Superior Court in and For Maricopa County,* 700 P.2d 1335, 1341-42, (AZ 1985)
- *Pioneer Bank & Trust v. Reunick*, 2009 SD 3, ¶ 15, 760 N.W.2d 139

STATEMENT OF THE CASE

The Smizers filed suit against Drey seeking compensatory and punitive damages and attorney fees for a motor vehicle accident the parties were in at an intersection in rural Gregory County. (R. 2-7.) Drey filed her Answer denying she was negligent. (R. 11-15.) The Smizers filed the lawsuit in Clay County, and the parties stipulated to a transfer of venue from Clay to Gregory County Circuit Court, Sixth Judicial Circuit, on December 13, 2012. (R. 16.) After a teleconference with the Smizers' counsel, Drey served but did not file her Motion for Violation of SDCL § 15-6-11(b)("Rule 11") on December 5, 2012, because the Smizers were wrongfully seeking attorney fees and punitive damages. (R. 96-100 & App. 025-026) Drey did not want to bring the motion, but was left with no choice because the Smizers and their counsel continued their claim to entitlement to attorney fees and punitive damages. (App. 025-026.)

The parties exchanged written discovery and conducted depositions. On January 13, 2014, Drey filed her Motion for Violation of SDCL § 15-6-11(b). (R. 96-100.) The Smizers then contacted Drey and requested that an amended motion for violation of SDCL §15-6-11(b) be filed because they previously dismissed their claim for attorney fees.[1] (R. 500.) Although unnecessary, Drey filed her Amended Motion for Violation of SDCL § 15-6-11(b) to appease the Smizers. (R. 500 & R. 156-159.) A hearing was held before the Honorable Kathleen F. Trandahl on February 11, 2014. (R. 154, 532-591.) At the same time, the trial court heard the Smizers' (two motions related to punitive damages) and Drey's opposing motions for partial summary judgment regarding the

[1] At the motions hearing, the Smizers' counsel informed the trial court that although the attorney fees claim was dismissed he still believes that attorney fees are recoverable which is a position neither supported by law or fact. (R. 583.)

Smizers' claim for punitive damages. (R. 481.) On May 24, 2014, the trial court issued its Memorandum Decision dismissing the Smizers' claim for punitive damages, granting Drey's Amended Motion for Violation of SDCL §15-6-11(b), and awarded sanctions to Drey. (R. 481-94.) The trial court's order was entered on July 25, 2014. (R. 516-17.)

The Smizers' appeal followed. The only issue before this Court is the trial court's granting of Drey's Amended Motion for Violation of SDCL §15-6-11(b).

STATEMENT OF THE FACTS

I. The Parties' Statement of Facts

The Smizers were driving in rural Gregory County during the morning of July 25, 2010. (R. 250.) Drey, at approximately the same time, had left her home to meet up with her family at a state park on the Missouri River. (R. 263.)

The speed limit is 65 mph on the road Drey was traveling. (R. 126). At most Drey was driving 45 mph on the road prior to beginning to slow down at the intersection of 294th Street and 347th Avenue. (R. 126 & 129.) There is a yield sign (not a stop sign) at the intersection of 294th Street and 347th Avenue on the section of road that Drey was driving. (R. 126). Drey had known about the yield sign in the past, and upon approaching the intersection slowed her vehicle to 35 mph. (R. 126 & 129.) Drey had turned 17 years old just four days before the accident. (R. 127.) Upon seeing the Smizers' vehicle, Drey slammed on her brakes in hopes of avoiding a collision. (R. 130.) The parties' vehicles collided causing personal injury to all of the parties. (R. 4.) The Smizers didn't observe Drey's driving. (R. 335.). They didn't see her until right as the collision happened. (R. 335.)

Drey was cited for failure to yield (SDCL § 32-29-3) and paid the fine because she wanted the matter over. (R. 132.) Drey did not intentionally fail to yield at the intersection the day of the accident. (R. 347.) Drey was not intoxicated or under the influence of alcohol or drugs at the time of the accident. (R. 127.) Drey was not distracted by her cellular phone. (R. 135-136.) Drey has never been cited for failure to yield at any other time in her life. (R. 133.) Drey has never had any other "close calls" or near accidents at this intersection before. (R. 134.) Drey did not intend to cause the accident or hurt the Smizers. (R 348.) Dorothy Smizer does not believe that Drey intended to cause the accident or to hurt anyone. (R. 143.) Dorothy Smizer testified, in regards to Drey's driving, that Drey was "probably thinking of something else and just zipped on through …" the yield sign. (R. 143-144.) There is no evidence that this accident was anything other than a simple motor vehicle accident involving general negligence.

Drey asked the Smizers during discovery to produce any evidence that they had proving they were entitled to (or even to seek) an award of punitive damages. The Smizers responded in interrogatories that Drey failed to slow down to 15 mph at the intersection, and that Drey failed to yield at the intersection. (App. 047-052.) The Smizers testified in response to interrogatories and requests for admissions that they are aware of Drey having driven through this yield sign on other occasions, and that their neighbors have seen Drey drive through this intersection and nearly cause accidents. (App. 069.) Yet, Dorothy Smizer, when deposed, testified that she is not certain that she ever observed Drey fail to yield at the intersection where the accident occurred. (App. 040-041.) Dorothy Smizer was also asked to name the witnesses referenced in the

Smizers' responses to requests for admission. Dorothy named two witnesses: Karen Klein and Brad Skalla. ("Skalla.") (App. 042-043.) Dorothy Smizer, however, wasn't sure if Karen Klein ever observed Drey fail to yield at the intersection. (App. 042.) Skalla, according to Dorothy Smizer, told Harlan Smizer that he had observed Drey fail to yield at the intersection where the accident occurred. (App. 043.) Skalla, however, stated under oath in contradiction to Dorothy's testimony and the Smizers' discovery responses. (App. 018-019.) Skalla does not even know which of the three Drey daughters Cristina Drey is. *Id.* Skalla has no memory of ever observing Drey fail to yield at any intersection let alone the intersection where the accident occurred. *Id.* Skalla also has no memory of ever telling the Smizers that he ever observed Drey fail to yield at any intersection including the intersection where the accident took place. *Id.* Contrary to the Smizers' sworn testimony, they do not have any witnesses.

In spite of knowing that Drey had no prior traffic record of failing to yield or that they had no evidence on which to support their claim, the Smizers and their counsel continued on with their claim for punitive damages. The Smizers and their counsel then improperly utilized the baseless claim to harass, threaten, and attempt to leverage a settlement from Drey in violation of Rule 11. (App. 053-054.) Unfortunately, the harassment, threats, and attempts to leverage a settlement continued even after the trial court dismissed the Smizers' punitive damages claim. (App. 010-017.) Instead of focusing on the issue of compensatory damages and constructively moving the litigation forward, the Smizers and their counsel were focused on improperly threatening punitive damages even after their claim was dismissed and before this appeal was filed. *Id.*

The trial court witnessed the Smizers' and their counsel's continued improper use of punitive damages after it had dismissed the punitive damages claim. (App. 001-017.) The trial court awarded sanctions to Drey in the amount of $6,460.74. (R. 516-517.)

II. The Misstatements of Facts

Just as they did to the trial court, the Smizers and their counsel have made misstatements of facts about which Appellee Drey is compelled to alert the Court.

A. Drey Did Not Intentionally Fail to Yield at the Intersection.

While it is apparent (and certainly not denied) that Drey failed to properly slow her vehicle to 15 mph at the intersection, the Smizers have not presented any evidence that Drey intentionally failed to yield at the intersection. In their initial brief to this Court, the Smizers claim that Drey intentionally failed to yield at the intersection. (AB, pg. 1.) No evidence of Drey's alleged intentional failure to yield is cited in their brief.

The only evidence in relation to Drey's conduct in yielding at the intersection is that she slowed her vehicle from 45 mph to 35 mph upon approaching the intersection. (R. 126 & 129.) While Drey did not slow her vehicle to 15 mph, the Smizers have no evidence that Drey knew she had to slow to 15 mph, or that even if she did, that she intentionally failed to slow to 15 mph. Dorothy Smizer doesn't even know if she ever observed Drey fail to yield in the past. (R. 139-140.) Drey testified that she did not intentionally fail to yield at the intersection where the accident occurred. (R. 347-348.) Drey's action of slowing her vehicle upon approaching the intersection affirms her version of the events of the accident, with the trial court concurring. (R. 483 & 489.) As

noted, there is absolutely nothing in the record to support Appellant's assertion that Drey "intentionally failed to yield at the intersection".

B. Drey Did Not Narrowly Avoid a Collision with Kiley and Karen Klein (or Anyone Else).

The Smizers and their counsel state in their opening brief that:

> In a separate 2010 instance, Drey narrowly avoided a collision with Kiley Klein and her mother, Karen, at that same intersection. Like here, Drey was traveling at an excessive rate of speed. Like here, Drey failed to yield at the intersection. Like here, Drey didn't check for oncoming traffic. Like here, Drey gave no indication that she had any intention of stopping for oncoming traffic.

(AB, pgs. 7 & 12.) The Smizers and their counsel also state that the, "Drey's collision with the Smizers wasn't the only time she failed to yield at that intersection, however." (AB, pg. 6.) The Smizers and their counsel cite the Kiley Klein Affidavit to allegedly support their argument. (App. 020-021.) However, the Kiley Klein Affidavit is not the piece of material evidence the Smizers would have this Court believe. *Id.* In fact, as the trial court noted in its Memorandum Decision, "[]Kiley Klein, Plaintiff's alleged "corroborating" "material witness" does not corroborate anything. She doesn't even know if she had a near accident with Drey. This is the only witness Plaintiffs make their claim for punitive damages on after their other witness denied their claims made under oath." (R. 492.) Drey did not narrowly avoid a collision with Kiley and Karen Klein or anyone else at the accident intersection contrary to the representations made by the Smizers and their counsel. (R. 134.)

C. Drey Checked for Traffic at the Intersection.

At both the trial court hearing, and now in this appeal, the Smizers and their counsel argue that Drey did not check for oncoming traffic citing to one answer to one question in her deposition. (AB, pg. 5 & 12.) The Smizers and their counsel claim that, "Drey also admitted in her deposition that she didn't check for traffic as she approached the intersection." (*Id.*). That testimony is never provided. The trial court found that,

> Drey testified at her deposition that she was prevented from seeing the car the Smizers were traveling in because of a corn field on the right. The context of her testimony was that she checked for traffic, but couldn't see the Smizers' vehicle until it was too late because the intersection had an obstructed view. Drey has (sic) specifically denies she entered the intersection without looking either way for traffic. Drey contends she looked both ways for traffic upon approaching and entering the intersection.

(R. 482-83.)

The Smizers and their counsel also claim that: "Drey's counsel later tried to alter her deposition testimony in an affidavit, but Drey did not dispute the accuracy of her original statement." (AB, pg. 6.) Certainly, Drey no doubt was looking forward as she approached the intersection. That does not equate to her admitting that she failed to check for traffic. At another section of Drey's deposition, not cited by the Smizers and their counsel, is where Drey testified that she was prevented from seeing the Smizers' vehicle because of corn. (R. 197-198.) While the Smizers want this Court to only look at one response to one question, the context and implication of Drey's entire testimony is that she looked for traffic, but her view was obstructed by corn. (R. 197-98.)

In order to clarify the Smizers' counsel's claims to the trial court, Drey submitted a clarifying affidavit.[2] (R. 348.) Drey never "admitted in her deposition" or stated "that she didn't check for traffic." (AB pg., 5 & 12.) Drey looked for traffic upon approaching the intersection and there is no evidence to the contrary. (R. 348.)

D. Dorothy Smizer Concedes More than her Counsel Admits.

The Smizers and their counsel argue that, "[t]he trial court incorrectly stated that the Smizers agreed that Drey didn't purposely fail to yield." (AB, pg. 21.) The Smizers and their counsel represent to this Court that, "[t]he only concession Dorothy Smizer made, which the trial court seized upon, was that she did not believe that Drey intended to hurt her or Harlan." (AB, pg. 22.) The Smizers and their counsel also represent that, "Although Drey's counsel asked whether Drey intended to hit hurt (sic) the Smizers, Drey's counsel never got Dorothy Smizer to agree that she didn't think that Drey purposely failed to yield, as the trial court stated." (AB, pg. 23.) That is simply untrue. Dorothy Smizer made a glaring, and important, concession that the Smizers and their counsel wish this Court would overlook. When asked of the allegations of Drey intentionally failing to yield at the intersection, Dorothy testified that Drey, "was probably thinking of something else and just zipped on through there, and we happened to be coming along." (App. 044-045.) This statement comes directly after the quoted testimony from Dorothy in the Smizers' brief. (AB, pgs. 21-22 and App. 044-045.) The trial court was presented with this admission from Dorothy Smizer at the motions hearing. *Id.* Further, Harlan and Dorothy Smizer didn't even see Drey until right as the

[2] Affidavits can be submitted to clarify an ambiguity in a witness's earlier testimony or put it in the proper context. *Stern Oil Co. v. Border States Paving, Inc.,* 2014 S.D. 28, ¶ 14, 848 N.W.2d 273, 278.

collision happened so they have no way of knowing what Drey did or didn't do at the intersection. (R. 335.) Dorothy's testimony is that Drey may have mistakenly or inadvertently failed to yield at the intersection the day of the accident, contrary to counsel's statements to this Court.

E. Drey's Counsel Did Not "Craft Facts" to Match Drey's Argument.

The Smizers and their counsel accuse Drey's counsel of crafting facts that matched Drey's arguments. (AB, pg. 25.) The Smizers and their counsel also state that "[t]he trial court allowed Drey to alter her testimony to fit the story her counsel wanted to tell." (AB, pg. 25.) This is simply untrue. As stated earlier, the Smizers took one answer to one question in a deposition out of context to represent that Drey did not look for traffic at the intersection. Drey, however, testified at her deposition that she couldn't see the Smizers due to the obstructed view at the intersection. (R. 341-343.) Drey submitted a clarifying affidavit to the trial court to put her testimony in the proper context. (R. 348.). Drey's counsel is not crafting facts in this case.

F. The Trial Court Did Not Improperly Interpret Disputed Statements Attributed to Brad Skalla.

The Smizers and their counsel argue that, "there is question about what exactly Brad Skalla said to Harlan." (AB, pg. 27.) The Smizers and their counsel are attempting to manufacture a fact issue. The Smizers and their counsel inform this Court that they knew exactly what Harlan and Skalla discussed: "Dorothy and Harlan, however, remember differently." and "Dorothy and Harlan, however, remembered the conversation very well." (AB, pg. 27-28.)

First, it needs to be noted that Dorothy Smizer's deposition testimony does not stand for the proposition that Skalla told Harlan anything. Dorothy used the words, "I think they told my husband, not me." (AB, pg. 27.) Second, the Smizers and their counsel now take a vastly different position as to what Harlan and Dorothy remember about the alleged Skalla discussion than they did with the trial court. When the Smizers and their counsel submitted their brief in response to Defendant's Motion for Partial Summary Judgment and Motion for Violation of SDCL § 15-6-11(b), they explained away Dorothy's deposition testimony about the alleged corroborating witnesses by arguing,

> Similarly, Defendant's assertion that Plaintiff Dorothy Smizer was lying is unfounded. When Defendant asked Ms. Smizer about Mr. Skalla, Ms. Smizer simply recalled that she thought that her husband had told her something about it before he passed away:
>
> Q. Any other neighbors tell you that they've seen Chrissy fail to yield at that intersection, ma'am?
>
> A. I think they told my husband, not me.
>
> Q. Okay. And who was that?
>
> A. Brad Skalla told Harlan.
>
> The fact that Ms. Smizer recalled a statement she thought her husband told her during a discovery deposition is hardly evidence that she lied under oath. Faulty memories of another person's statements is precisely the reason hearsay is objectionable. *See,* SDCL §19-16-4.

(App. 086-087) So, where Dorothy and her counsel argued to the trial court that she wasn't being untruthful, but instead had a "faulty memor[y] of another person's statements," Dorothy and her counsel now take the position that she "remembered the conversation very well."

Without regard to the inconsistent position on Dorothy's faulty memory, Skalla provides no support, whatsoever, for this alleged conversation. Skalla stated that he has: "no memory of ever observing Cristina Drey fail to yield at the intersection of 347th Avenue and 294th Street"; "no memory of ever observing Cristina Drey fail to yield at any intersection"; and that he does not even know which daughter of the three Drey daughters is Cristina Drey. (App. 018-019.) The Smizers and their counsel argue that, "Drey's counsel, however, didn't obtain the Skalla's affidavit until after 2013. By then, Skalla could not remember the conversation between him and Harlan." (AB, pg. 28.) The Smizers and their counsel also argue that, "The trial court didn't allow the Smizers to depose Mr. Skalla." and "The trial court simply accepted as truth an affidavit that Drey's counsel prepared for Mr. Skalla to sign.[3] Worse, the trial court interpreted Mr. Skalla's faulty memory as an affirmative statement of fact that he never told the Smizers about Drey failing to yield at the intersection before." (AB, pg. 28.)

Skalla's affidavit contains language that is stronger than the "think" language provided by Dorothy's deposition testimony. Skalla's affidavit is not testimony of his faulty memory as the Smizers and their counsel now want to argue. Skalla doesn't even know who Cristina Drey is. (App. 018-019.) As the trial court found: "The Smizers' 'smoking gun' witness, Brad Skalla, testified under oath that he disagrees with Dorothy Smizer's sworn testimony. Defendant also proved that Plaintiffs' responses to Requests for Admissions, which were made under oath, were untrue." (R. 492.)

[3] The Smizers rely on the Affidavit of Kiley Klein, prepared by their counsel, in the proceedings before the trial court and this Court. The Smizers never explain why their use of the Kiley Klein Affidavit is any different than Drey's use of the Brad Skalla Affidavit. The trial court, however, noticed distinct differences in the testimony provided by Kiley Klein and Brad Skalla in its Memorandum Decision. (R. 492.)

STANDARD OF REVIEW

This appeal stems from the trial court's decision to sanction the Smizers and their counsel under Rule 11 for their failure to conduct a reasonable investigation of their claim for punitive damages and because of their continued and improper use of the punitive damages claim against Drey.

SDCL § 15-6-11(a) provides that,

> Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each party shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

"It is an attorney's duty under SDCL 15-6-11(a) to conduct a 'reasonable inquiry' into the facts and law prior to commencing any action. SDCL 15-6-11(a) clearly states that the attorney's signature represents that the signer has undertaken such an inquiry and believes the action is well grounded in law and fact." *Anderson v. Prod. Credit Ass'n*, 482 N.W.2d 642, 645 (S.D. 1992).

"Appeals involving sanctions under Rule 11 (SDCL 15-6-11) are reviewed under the abuse of discretion standard of review. *Hahne v. Burr,* 2005 SD 108, ¶ 22, 705 N.W.2d 867, 874. An abuse of discretion is a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. *Id.*" *Pioneer Bank & Trust v. Reynick,* 2009 SD 3, ¶ 13, 760 N.W.2d 139, 143. *See, also, Hahne v. Burr,* 2005 SD 108, ¶ 22, 705 N.W.2d 867, 874.

ARGUMENT

I. THE SMIZERS HAVE NO COGNIZABLE CLAIM FOR PUNITIVE DAMAGES.

The trial court granted Drey's Rule 11 motion in part because the Smizers had neither a factual nor legal basis for their claim of punitive damages. The trial court's determination was correct and should be affirmed.

A. South Dakota Law on Punitive Damages.

SDCL § 21-3-2 sets the standard for punitive damages in South Dakota:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed…, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

South Dakota "requires more egregious conduct than … states which require proof of conduct more egregious than gross negligence [… and …] South Dakota is among the states having the most stringent conduct requirement." *Benson v. Giordano,* 2008 WL 2390835, *3 (D.S.D. 2008) citing *Bierle v. Liberty Mut. Ins. Co.,* 792 F.Supp. 687, 691 (D.S.D. 1992). "Negligence by itself, however, is not equivalent to willful and wanton misconduct.'" *DeNeui v. Wellman,* 2009 WL 4847086, *6 (D.S.D. 2009) and *Tranby v. Brodock,* 348 N.W.2d 458, 461 (S.D. 1984). The conduct must be "more than mere mistake, inadvertence, or inattention" and the party must have a "willingness to injure another." *See, Gabriel v. Bauman,* 2014 S.D. 30,¶ 16, 847 N.W.2d 537, 543.

"Malice is an essential element of a claim for punitive damages." *Kjerstad v. Ravellette Publ'ns*, 517 N.W.2d 419, 425 (S.D. 1994). Malice may be actual or

presumed. *Holmes v. Wegman Oil Co.*, 492 N.W.2d 107, 112-13 (S.D. 1992). Actual malice is a positive state of mind, evidenced by the desire and intention to injure another, actuated by hatred or ill will towards that person. *Dahl v. Sittner*, 474 N.W.2d 897, 900 (S.D. 1991). Presumed or legal malice is malice which the law infers from or imputes to certain acts. *Id.* "Thus, while the person may not act out of hatred or ill-will, malice may nevertheless be imputed if the person acts willfully or wantonly to the injury of the other. In this context, however, [this Court has] said: Malice as used in reference to exemplary damages is not simply the doing of an unlawful or injurious act, it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." *Isaac v State Farm Mut. Auto. Ins. Co.,* 522 N.W.2d 752, 761 (S.D. 1994)(other citations omitted).

This Court has recently stated that,

> In these cases, we have consistently declared that willful, wanton, and reckless conduct 'partakes to some appreciable extent, though not entirely, of the nature of a deliberate and intentional wrong.' 'Conduct is gross, willful, wanton, or reckless when a person acts or fails to act, with a conscious realization that injury is a probable, as distinguished from a *possible* (ordinary negligence), result of such conduct.' We have also said that a defendant must have 'an affirmatively *reckless* state of mind.'

Gabriel v. Bauman, 2014 S.D. 30, ¶ 11, 847 N.W.2d 537, 541 (emphasis in original.)

This Court went on to state that,

> The conduct must be more than mere mistake, inadvertence, or inattention. There need not be an affirmative wish to injure another, but, instead, a willingness to injure another. "[A] defendant's reckless state of mind may be inferred from the conduct and actions so patently dangerous that a reasonable person under the circumstances would know, or should know, that his conduct will in all probability prove disastrous. On the other hand, this Court warned long ago that if we draw the line of willful, wanton, or reckless conduct too near to that constituting negligent

> conduct, we risk 'opening a door leading to impossible confusion and eventual disregard of the legislative intent … to give relief from liability for negligence.

Gabriel at ¶ 16.

The Smizers erroneously argue that the trial court applied the wrong standard for presumed malice (AB, pgs. 31-32) when it indeed applied the correct one. (R. 488-489.) The trial court even cited to some of the same cases offered by the Smizers in their brief herein to define presumed malice.

The Smizers have the burden to prove that Drey committed an act of the nature of a deliberate and intentional wrong, and that she knew injury was probable as opposed to possible. The Smizers also need to prove that Drey's conduct was more than a mere mistake, inadvertence, or inattention and that she had a willingness to injure another. The Smizers additionally need to prove that Drey's conduct was more than simple negligence. Not only are the Smizers unable to meet this standard but they have not even a scintilla of evidence to support their claim.

B. No Facts Were Presented By the Smizers That Substantiate Their Claim For Punitive Damages.

The Smizers do not contend that Drey acted with actual malice the day of the accident; they contend that Drey acted with presumed malice. *See,* Appellants' Brief. The trial court found that "[t]here is no evidence whatsoever that supports a claim for punitive damages." (R. 492).

Drey's conduct in the accident was, at the worst, simple negligence. The only evidence in this case is that Drey failed to slow her vehicle to a speed lower than 35 mph. Lost in the Smizers' argument is that Drey had slowed her vehicle from 45 mph to 35

mph when she approached the intersection. (R. 126 & 129.) The speed limit on the road is 65 mph. (R. 126.) Drey was not intoxicated or distracted by her telephone or any device. (R. 127 & 135-136.) Drey has no prior citations on her record for failure to yield. (R. 133.) Drey was 17 years old at the time of the accident. (R. 127.) Drey has never intentionally failed to yield at this (or any other) intersection prior to the accident. (R. 347.) The Smizers themselves admit that they have no evidence that Drey intentionally failed to yield as Dorothy testified that Drey may have just been thinking of something else when she drove through the intersection. (App. 044-045.) Drey looked both ways upon approaching the intersection. (R. 197-98 & 348.) Drey didn't intend to cause the accident. (R. 143.) Drey did not intentionally fail to yield the day of the accident. (R. 347.)

The Smizers argue that Drey had prior knowledge about the yield sign, and that she failed to slow down to 15 mph. (AB, pg. 11.) Lacking in their analysis is that the Smizers don't argue, or produce any evidence, that Drey knew she had to slow down to 15 mph to properly yield at the time of the accident and that she intentionally failed to do so. The Smizers have only proved that Drey committed an unlawful act, which of course is not enough to warrant punitive damages in South Dakota. *Isaac* at 761. This was the law in South Dakota prior to, at the time of, and after the Smizers filed suit.

The Smizers' Second Amended Complaint "simply alleges a negligence claim and inserts a 'formulaic recitation' that Defendant's conduct was 'willful and wanton.'" *Wheeler v. Hruza,* 2010 WL 2231959, *2 (D.S.D. 2010). When asked to produce evidence to back up their claims of willful, wanton, or reckless conduct, the Smizers were

caught making untrue statements in depositions and in written discovery responses.[4] (R. 492.) There is no factual basis for the Smizers' claim for punitive damages.

C. There Is No Legal Precedent in South Dakota For Punitive Damages in a Case Similar to this One.

The Smizers argue that this Court has repeatedly held that punitive damages are warranted if a defendant has demonstrated a conscious disregard for the rights of other motorists. In making that statement, the Smizers cite to two cases. The first, *Flockhart v. Wyant,* 467 N.W.2d 473, 478 (S.D. 1991), the defendant was driving with a 0.30 BAC and had beer in his vehicle at the time of the accident. He also had five previous alcohol-related offenses and had been through various alcohol treatment programs. The defendant had seen movies, attended classes, and been to lectures about drinking and driving. Yet, he continued to drink and drive and crossed the median while driving drunk in causing an accident. *Flockhart* is not similar to this case. Of note, this Court in *Flockhart* established that drunk driving (a violation of the law), by itself, does not establish the malice necessary to impose punitive damages. *Flockhart* at 467 N.W.2d 473, f.n. 7 (S.D. 1991) and affirmed by *Berry v. Risdall,* 1998 SD 18, ¶ 36, 576 N.W.2d 1, 9. The Smizers also cite to *Berry* as a case in support of their argument. However, this Court in *Berry* allowed a claim for punitive damages against a drunk driver who had a BAC of 0.122 two hours after the accident. Testimony was presented that the BAC was as high as 0.150 at the time of the accident. That intoxicated defendant was speeding upwards of 15 mph over the limit, and did not apply his brakes or swerve to avoid the accident. The defendant in *Berry* admitted he was aware of the dangers of driving under

[4] Attorney fees are also available to a party who proves an improperly denied request for admission. SDCL § 15-6-36(a).

the influence from attending AA meetings for a year and an eight hour driving course as a result of a prior DUI/accident. The defendant was found to be a problem drinker who had been amply educated and warned as to the dangers of drinking and driving and yet made the conscious decision to continue to do so anyway. *Id.* Again, *Berry* is nothing like the case at hand where a completely sober and otherwise attentive 17 year old driver slowed considerably and traveling well below the speed limit simply failed to yield. Also unlike the defendant in the *Berry* case, Drey also attempted to brake and avoid the accident.

The Smizers cite to other South Dakota punitive cases that have not even the slightest factual resemblance to this case. One involves allegations of improper train procedures. *Boomsma v. Dakota, Minnesota, & Eastern R.R. Corp,* 2002 SD 106, 651 N.W.2d 238(Train company knowingly failed to utilize warning signs, flares, or whistles when it blocked a road with flatbed cars in the dark of the night.) Another is a bad faith insurance claim. *See, Biegler v. American Family,* 2001 SD 13, 621 N.W.2d 592 and *Harter v. Plains Ins. Co.,* 1998 SD 59, 579 N.W.2d 625. The Smizers also cite to a case involving the failure to investigate claims of sexual abuse of minors after being properly notified of said abuse. The Court permitted punitive damages in that case because the allegations could prove an intentional infliction of emotional distress claim. However, the United States District Court for the District of South Dakota restated this Court's position that negligence alone does not result in an award of punitive damages. *See, Brown v. Youth Services Int'l of S.D., Inc.,* 89 F.Supp.2d 1095, 1107 (D.S.D. 2000). This Court in *Schuldies v. Millar,* 555 N.W.2d 90, 99-100 (S.D. 1996) stated that punitive damages were available in a slander case (an intentional tort) involving a failure to

release property rightfully belonging to another (a conversion claim in the Complaint.)[5] The Smizers also cite to a case involving an invasion of privacy where male employees were spying on female employees using the restroom. *See, Kjerstad v. Ravellette Publications, Inc.,* 517 N.W.2d 419 (S.D. 1994). The Smizers also cite to *Holmes v. Wegman Oil Co.,* 492 N.W.2d 107 (S.D. 1993), which involved more than what the Smizers and their counsel tell this Court when they state that presumed malice was found when a "corporation knew of the potential danger associated with one of its products but failed to act promptly to recall or correct it." (AB, pg. 15.) The defendant in *Holmes* not only "failed to act properly or recall or correct it," but made a conscious effort to provide no warnings to customers that its controls caused explosions and addressed liability of control explosions with the foregone conclusion they were not involved (while continuing to maintain that policy there were 22 explosions, 5 deaths, and 19 injuries) despite knowledge to the contrary. These are important facts left out in the Smizers' analysis of the *Holmes* case. Also, in *Till v. Bennett,* 281 N.W.2d 276 (S.D. 1979), this Court permitted a punitive damages claim in a case involving repeated trespass of cattle up to a week-long time to land where a neighbor's cattle also ate the plaintiff's crop. All of these cases involve intentional conduct of a defendant, and allege more than a violation of a traffic law -- whether knowing or not. All of these cases involve more than simple negligence.

The Smizers also cite to this Court's recent decision in *Gabriel v. Bauman,* 2014 S.D. 30, 847 N.W.2d 537. The Court wasn't addressing punitive damages in *Gabriel*, but was addressing the issue of willful, wanton, or reckless conduct. In that case, the

[5] The Smizers and their counsel fail to inform this Court that the *Schuldies* Court allowed punitive damages not only because of the conversion claim, but also because of a slander claim - both intentional torts.

defendant was speeding while responding as a volunteer firefighter. Tim Bauman saw a vehicle positioned to make a turn in front of him while Bauman was speeding down the highway. A passenger of Bauman's blurted out "oh, no, don't go, don't go." *Gabriel* at ¶ 2. The other vehicle turned in front of Bauman and there was an accident. This Court in determining whether the plaintiffs overcame governmental immunity if Bauman had acted willful, wantonly or recklessly determined that Bauman hadn't. This Court stated that a defendant must have an affirmatively reckless state of mind. *Gabriel* at ¶ 11. Importantly, and highly relevant to this case, is this Court's statement that,

> The conduct must be more than mere mistake, inadvertence, or inattention. There need not be an affirmative wish to injure another, but, instead, a willingness to injure another. '[A] defendant's reckless state of mind may be inferred from conduct and actions so patently dangerous that a reasonable person under the circumstances would know, or should know, that his conduct will in all probability prove disastrous [.]' On the other hand this Court warned long ago that if we draw the line of willful, wanton, or reckless conduct too near to that constituting negligent conduct, we risk 'opening a door leading to impossible confusion and eventual disregard of the legislative intent … to give relief from liability for negligence.'

Gabriel at ¶ 16. Drey made the mistake of only slowing down to 35 mph instead of 15 mph. Drey certainly had no willingness to injure the Smizers. Dorothy testified that Drey may have just been thinking of something else (mistake, inadvertence, or inattention) when she failed to slow to 15 mph. Drey is guilty of simple negligence in the accident, which doesn't warrant a claim of punitive damages.

D. Other Jurisdictions Do Not Permit Punitive Damages in a Case Like This.

The Smizers and their counsel also refer to cases from other jurisdictions to allegedly back up their claim that they are entitled to punitive damages. These cases, like

the South Dakota cases the Smizers cite, are distinguishable from the accident between the Smizers and Drey.

The first case, *Eliason v. Wallace,* 209 Mont. 358, 363, 680 P.2d 573, 575-76 (1984), is inapposite to South Dakota law. In that case, the trial court and Montana Supreme Court found that the defendant deliberately proceeded to act in conscious disregard of or indifference to a risk when he turned in front of an upcoming vehicle. *Id.* at 575-576. No evidence has been presented by the Smizers that Drey consciously disregarded or was indifferent to a risk when she only slowed down her vehicle to 35 mph instead of 15 mph when she thought she was yielding at the intersection. As this Court has stated in reference to South Dakota law on punitive damages, malice as used in reference to exemplary damages is not simply the doing of an unlawful or injurious act. *Isaac* at 761.

The South Carolina case cited by the Smizers, *Fairchild v. S.C. DOT,* 385 S.C. 344, 354, 683 S.E.2d 818, 823 (Ct. App. 2009), is also inapposite to this case. South Carolina, unlike South Dakota, permits negligence *per se* to be evidence of recklessness and willfulness requiring submission to the jury. That isn't the law in South Dakota. *Isaac* at 761. Unlike *Fairchild,* the Smizers have not produced any evidence that Drey acted willfully, wantonly, or recklessly in failing to slow to 15 mph instead of 35 mph. *Austin v. Specialty Transp. Servs.,* 594 S.E.2d 867 (S.C. 2004) is also inapposite to this case. While the Smizers and their counsel inform this Court that the "South Carolina Supreme Court upheld a punitive damages verdict against a driver who failed to yield to oncoming traffic," the Smizers fail to inform the Court that the defendant had a stop sign as opposed to a yield sign. And, as discussed above, negligence is enough in South

Carolina to argue recklessness or willfulness for a claim of punitive damages. This Court, however, has found that an unlawful or injurious act is not enough for a finding of malice. *Isaac* at 761.

The Smizers also cite to *Dame v. Estates,* 233 Miss. 315, 101 So.2d 644. Like their other cited cases, *Dame* is inapposite to the one at hand. Mississippi does not require malice as South Dakota does. *Dame* at 318. Further, in this case, Drey slowed down her vehicle to 35 mph and did not just blow through a stop sign which was the conduct involved in *Dame*. *Id.* South Dakota does not permit punitive damages for a simple negligent or unlawful act. *Isaac* at 761.

The trial court was right to dismiss the Smizers' claim of punitive damages because no factual or legal basis was presented. The Smizers' and their counsel's claim for punitive damages was not grounded in fact or law. The trial court did not abuse its discretion in granting Drey's Rule 11 Motion. *Pioneer* at ¶ 13.

II. THE TRIAL COURT WAS RIGHT TO GRANT DREY'S RULE 11 MOTION.

SDCL § 15-6-11(b) provides that,

> By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the

> extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery ; …

"Clearly, the statutes provide that the trial court may impose sanctions upon an attorney or any person who signed the pleading or other papers …" *Anderson v. Production Credit Ass'n,* 482 N.W.2d 642, 645 (S.D. 1992). It is an attorney's duty under SDLC § 15-6-11 to conduct a reasonable inquiry into the facts and law prior to commencing an action. *Id.* An attorney's signature represents that the signer has undertaken such an inquiry and believes the action is well grounded in law and fact. *Id.*

The purpose behind Rule 11 is to deter abuses by parties and counsel. *Id.* Mere good faith is not enough to withstand a motion for sanctions. *Id.* SDCL §15-6-11 is intended to prevent attorneys and parties from bringing claims that have an improper purpose such as to harass or cause a needless increase in the cost of litigation. *See, Tristate Refining and Inv. Co., Inc., v. Apaloosa Co.,* 431 N.W.2d 311, 315-16 (S.D. 1988).

The trial court found that the Smizers violated Rule 11 by continuing the claim of punitive damages after discovery even though there was "no evidence whatsoever that supports a claim for punitive damages." (R. 492.) The trial court found the Smizers claim for punitive damages frivolous when it stated: "Simply put, this is not a punitive damages case." (R. 488.) The trial court also found that the Smizers and their counsel violated Rule 11 because they utilized their claim of punitive damages for the improper

purpose to "harass and attempt to leverage a settlement." (R. 491.) The trial court's Order should be affirmed.

A. The Punitive Damages Claim In This Case Was Baseless.

As argued earlier in this brief, the Smizers had no factual or legal basis for their claim of punitive damages at both the beginning of this litigation and at the time of the motions hearing. There was no evidence produced that Drey intentionally failed to yield at the intersection the day of the accident with the Smizers. The evidence the Smizers and their counsel claims they had was found to not be true. (R. 483, 492.) The accident was nothing more than a simple motor vehicle accident that contained no elements of malice, whether actual or presumed.

Rule 11 sanctions are available, and warranted, when a party makes baseless claims for improper purposes and after failing to make a reasonable investigation of the claim. *Boone v. Superior Court in and For Maricopa County,* 700 P.2d 1335, 1341-42 *(*AZ 1985). Here, the Smizers and their counsel failed to make a reasonable investigation of their claim both prior to bringing it and during/after discovery. The Smizers have never presented any rational argument in favor of their claim, nor did they attempt to establish a new theory of law with a good faith effort. They brought their claim for an improper purpose, which is all in violation of Rule 11. *See, Pioneer Bank & Trust v. Reynick,* 2009 SD 3, ¶ 15-16, 760 N.W.2d 139, 143-144. The Smizers' claim for punitive damages was baseless and frivolous, and the trial court was right to grant Drey's Rule 11 motion.

B. The Smizers Didn't Make a Proper Inquiry & Investigation Before Pleading And Then Continuing With their Claim for Punitive Damages.

The Smizers were made aware, through counsel, that Drey contested their claim for punitive damages on December 5, 2012 when she served her Motion for Violation of SDCL § 15-6-11(b) following a teleconference regarding the same between the parties' counsel. (R. 491.) Through the discovery phase, the Smizers in response to Requests for Admission, testified under oath that their "neighbors have also seen the Defendant drive through this yield sign and nearly cause accidents." (App. 069.) The Smizers also testified under oath in response to interrogatories that they have their "own information and belief" that Drey "has continued to fail to yield at the intersection of 347th Avenue and 294th Street near Herrick, SD." (App. 047-052.) Dorothy also testified that two neighbors observed Drey fail to yield. As we now know, the Smizers' sworn written testimony was contrary to the sworn deposition testimony and not true as the trial court found. (R. 492.)

The Smizers' alleged witnesses do not exist. Skalla, as shown earlier in this brief, doesn't even know which of the three Drey daughters Cristina is. (App. 018-019.) The next Smizer witness, Kiley Klein, "does not corroborate anything" as the trial court found. (R. 492.) The Smizers had no evidence that Drey purposely failed to yield at the intersection the day of the accident (Drey's conduct of slowing down as she approached the intersection is evidence that she did not intentionally fail to yield at the intersection.) either before commencing their lawsuit or at the time of the motions hearing. The Smizers' claimed evidence was also false. As the trial court stated,

> What concerns this court the most is not that counsel for Plaintiffs plead (sic) punitive damages based upon the representation of the

> Smizers, but that they continued with the claim for punitive damages after discovery was completed. There is no evidence whatsoever that supports a claim for punitive damages. The claim should have been dismissed at the time their claim for attorney fees was dismissed. For this reason, the court will grant the Motion for Violation of SDCL 15-6-11(b).

(R. 492.)

Rule 11 sanctions are available when a party brings a baseless and frivolous claim and by failing to make a reasonable investigation or inquiry prior to or while continuing to bring it. Here, even assuming the Smizers gave their attorneys representations to support the initial punitive allegation, Counsel failed to secure any evidence to support the punitive claim and yet continued to not only pursue it but used the threat of it inappropriately. Counsel for the Smizers could have interviewed, or secured testimony or an affidavit of Skalla. Had they done so, they would have known he did not support their claim. Counsel did belatedly secure an affidavit of Kiley Klein which read in its best light for the Smizers "does not corroborate anything". She can't even identify Cristina Drey as the purported "Driver" about which she describes in her affidavit.

The trial court did not abuse its discretion by granting Drey's Rule 11 Motion. The trial court's decision is not "clearly against, reason and evidence." *Pioneer* at ¶ 13.

C. The Smizers' and Their Counsel Utilized The Claim of Punitive Damages for Improper Purposes.

The trial court also found that it, "is clear from the Smizers' conduct that their purpose in bringing a claim for punitive damages (just like their earlier attempt to claim attorney fees under the criminal restitution statutes and the South Dakota commercial drivers' license statutes even though Drey doesn't have a CDL) is to harass and attempt

to leverage a settlement." (R. 491.) Rule 11 sanctions are also available, and warranted, when a party makes claims for improper purposes. *Boone* at 1341-42. "In addition, Rule 11's bar against presenting pleadings to the court for an improper purpose would protect against the use of punitive damages solely for leverage." *Probasco v. Ford Motor Co.,* 182 F.Supp.2d 701, 704-05 (C.D. Ill. 2002).

The Smizers and their counsel utilized the claim of punitive damages to harass, threaten, and leverage Drey in settlement negotiations all in violation of Rule 11. "The Smizers' December 4, 2013 settlement demand not only improperly threatens punitive damages in an attempt to extract settlement, but it seeks Drey's confidential and privileged information that is not only irrelevant to the issue of punitive damages but also any other issue." (App. 053-054 & 491.) The Smizers sought the name of Drey's personal attorney, which is irrelevant to any claims and is privileged, while at the same time threatening punitive damages if Drey didn't settle their claims at the amount the Smizers claimed.[6]

Nevertheless, for the first time, the Smizers now argue that their December 4, 2013 letter was to protect Drey. The legal requirement or duty the Smizers and their counsel allegedly have to protect Drey is not explained. The reality is that the letter was sent to harass, threaten, and leverage Drey while also attempting to manufacture an alleged insurance bad faith claim to benefit the Smizers. Of note, the Smizers also argue

[6] The Smizers' counsel also made the unfounded and defamatory statement to the trial court that Drey's counsel wasn't her "own, *independent,* counsel" for apparently no purpose other than to harass and leverage a settlement from Drey. (App. 088.) The undersigned takes great offense to any insinuation that he, or his firm, has not been anything but independent counsel for Drey looking out for her best interests. In fact, it is well settled law in South Dakota that the punitive claim is not covered by insurance which is why Drey's Counsel zealously defended against the same for their client and which makes the Smizer's continuation of the claim without any supporting evidence even more egregious.

that, "Drey's insurer and counsel offered settlement amounts for *less* than Harlan Smizer's medical bills."[7] (AB, pg. 31.)

First, let this be clear: the Smizers' use of punitive damages was not to protect Drey as they now contend; it was for the sole purpose to harass, threaten, and leverage a settlement from Drey just as the trial court found. (R. 491.) Even after the trial court issued its Memorandum Decision and dismissed the Smizers' claim for punitive damages, the Smizers and their counsel continued to utilize the punitive damages claim to harass, threaten, and leverage a settlement from Drey. Drey received the trial court's Memorandum Decision on May 29, 2014 through the mail. (App. 003.) Two hours after Drey's counsel received the Memorandum Decision, the Smizers' counsel emailed Drey's counsel a letter which continued to use the dismissed claim of punitive damages to harass, threaten, and intimidate Drey to leverage a settlement. (App. 003-004 & 010-017.) The trial court was made aware of the Smizers' conduct through Drey's counsel's affidavit for attorney fees and costs, which is likely why the trial court granted the entire amount of attorney fees and costs requested by Drey. (*Id.* and R. 516-17.)

The Smizers' and their counsel stated in their May 29, 2014 letter,

> That being said, we intend to appeal Judge Trandahl's ruling regarding both the Rule 11 and the partial summary judgment on punitive damages. We believe that Judge Trandahl's ruling is directly contradicted by South Dakota precedence. We are willing to settle this case for [redacted] for both Harlan and Dorothy, but absent that, we will take this case to trial, where we still expect to get an excess verdict against the Defendant. We intend to then appeal the earlier summary judgment motion and re-litigate the punitive damages issue in a later trial.

[7] Not that it is germane to this appeal, but because the Smizers brought it up in their initial brief, Drey disputes the extent of Harlan's claimed injuries and contends he had pre-existing injuries. There is also a dispute as to the extent of the reasonable and necessary medical treatment Harlan had that was related to the accident.

(App. 010.) The Smizers continued their threat of punitive damages the very day Drey found out it was dismissed! (App. 010-011.) Drey expressed astonishment at the Smizers' and their counsel's continued and improper use of the punitive damages in her June 2, 2014 letter. (App. 012-013.) Drey also requested that the parties restart settlement negotiations and offered to stipulate to a reasonable scheduling order. *Id.*

Unfortunately, that didn't end the Smizers' and their counsel's improper use of punitive damages. In their responding June 2, 2014 letter to Drey, the Smizers and their counsel strained to argue that Drey's counsel was now threatening them to not exercise their "constitutionally-protected due process rights" when Drey simply asked them to comply with the trial court's Memorandum Decision. (App. 014.) (What "constitutionally-protected due process rights" the Smizers have to continue to harass, threaten, and intimidate Drey with their dismissed claim of punitive damages is unknown to Drey. The Smizers had their hearing on punitive damages, and it was dismissed.) The trial court's dismissal should have ended any discussion of punitive damages, let alone the threat of them by the Smizers and their counsel. Drey again attempted to redirect the attention to the Smizers' alleged compensatory damages and to move the litigation forward. (App. 016-017)

The Smizers' and their counsel's purpose in bringing their claim of punitive damages was for no other purpose than to harass, threaten, and attempt to leverage a settlement from Drey as the trial court rightfully found. (R. 491.) Unfortunately, the Smizers' and their counsel's sanctioned conduct continued after the trial court dismissed their claim for punitive damages, which further supports the trial court's ruling that the Smizers were in violation of Rule 11.

The trial court was right, both factually and legally, in granting Drey's Amended Motion for Violation of SDCL § 15-6-11. The trial court did not abuse its discretion in granting Drey's Amended Motion for Violation of SDCL 15-6-11, and that decision is not "clearly against, reason and evidence." *Pioneer* at ¶ 13. Drey respectfully asks this Court to affirm the trial court.

CONCLUSION

The motor vehicle accident between Drey and the Smizers was nothing more than a simple motor vehicle accident involving the negligence of a 17 year old girl. There was no intentional failure to yield at the intersection by Drey nor does the Smizers' and their counsel's innuendo prove as much. The Smizers and their counsel did not make a reasonable inquiry into their claim for punitive damages prior to or while bringing it all in violation of Rule 11. Further, the Smizers and their counsel utilized the claim of punitive damages not for any legitimate purpose, but rather to harass, threaten, and leverage Drey in settlement negotiations. The Smizers' and their counsel's conduct continued even after the trial court issued its Memorandum Decision furthering evidencing that the intent and purpose of the punitive damages claim was improper, and that the trial court did not abuse its discretion in granting Drey's Amended Motion for Violation of SDCL § 15-6-11(b). As such, Drey respectfully asks this Court to affirm the trial court and deny the Smizers' appeal.

Dated this 2nd day of March, 2015.

KLASS LAW FIRM, LLP
Attorneys at Law

/s/ Ryland Deinert

Ryland Deinert
Timothy A. Clausen
4280 Sergeant Road, Suite 290
Sioux City, IA 51106
Telephone: (712) 252-1866
Facsimile: (712) 252-5822
deinert@klasslaw.com
clausen@klasslaw.com
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellee's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,200 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, any addendum materials, and any certificates of counsel.

/s/ Ryland Deinert
One of the attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2015, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 2nd day of March, 2015, I sent copies of the foregoing to Appellants' counsel by email and United States Mail, first class postage prepaid, to the following address:

Michael Bornitz
Robert Trzynka
CUTLER LAW FIRM, L.L.P.
Sioux Falls, SD
bobt@cutlerlaw.com
mikeb@cutlerlaw.com

/s/ Ryland Deinert
One of the attorneys for Appellees

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27192

DOROTHY SMIZER, in her individual capacity and as Personal Representative of the Estate of HARLAN SMIZER, Deceased.

Plaintiffs and Appellants,

v.

CHRISTINA DREY,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
GREGORY COUNTY, SOUTH DAKOTA

THE HONORABLE KATHLEEN F. TRANDAHL
CIRCUIT JUDGE

APPELLANTS' REPLY BRIEF

Michael D. Bornitz
Robert D. Trzynka
CUTLER LAW FIRM, LLP
100 North Phillips,
9th Floor
PO Box 1400
Sioux Falls, SD 57101-1400

Timothy A. Clausen
Ryland Deinert
KLASS LAW FIRM, L.L.P.
Mayfair Center, Upper Level
4280 Sergeant Road, Suite 290
Sioux City, IA 51106

Notice of Appeal Filed August 22, 2014.

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PRELIMINARY STATEMENT

References to the settled record will be designated as "R." Appellants' initial brief will be referred to as "AB." Appellee's responsive brief will be referred to as "RB."

REPLY

Appellee has yet to cite a *single case* where any court rejected Appellants' basis for punitive damages, much less one where the attorneys were sanctioned under Rule 11. Numerous courts, however, have upheld punitive damages under similar facts. Appellee and the trial court ignored undisputed facts, inappropriately interpreted facts in Appellee's favor rather than Appellants', and ignored pertinent case law. The trial court abused its discretion by granting Appellee's motion for Rule 11 sanctions. Its decision should be reversed.

I. Appellee's allegations that Appellants misrepresented the record are baseless.

Appellee alleges that Appellants misrepresented various facts. Appellee is wrong. As a preliminary matter, Appellee's contention is particularly confusing since most of Appellants' purported "misstatements of fact" are direct quotes. Appellee obviously disagrees with what those direct quotes mean. That, however, does not rise to a misstatement of fact. Instead, the differing interpretations of those facts create disputes of material fact for the jury to resolve, precluding *either* summary judgment or Rule 11 sanctions. Gabriel v. Bauman, 2014 SD 30, ¶ 15, 847 N.W.2d 537. The trial court abused its discretion by failing to make that distinction.

A. Ample evidence supports Appellants' contention that Appellee intentionally or recklessly failed to yield.

Appellee contends that there is "[n]o evidence of [Appellee's] alleged intentional failure to yield." Appellee Brief, p. 7. Appellee, however, doesn't dispute that she knew that there was a yield sign at the intersection. (R. 265). Appellee doesn't dispute that stopping at that intersection would be difficult because the roads were graveled rather than paved. (R. 268). Appellee also doesn't dispute that she *entered* the intersection at *no slower than* 20 miles over the speed limit. RB, p. 7; (R. 352). Appellee similarly doesn't dispute that she *regularly* entered the intersection at *no slower than* 20 miles per hour over the speed limit. (R. 269, 352-53). The fair inference from all these facts is that Appellee willfully or wantonly entered the intersection and hit Appellants with her car. The trial court abused its discretion by failing to interpret these facts in Appellants' favor. *Nationwide Mut. Ins. Co. v. Barton Solvents, Inc.*, 2014 SD 70, ¶ 10, 855 N.W.2d 145 ("We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party.").

Appellee attempts to mitigate her recklessness by claiming that she slowed down from 45 miles per hour to 35 miles per hour. RB, p. 7. That fact, however, is disputed. Appellant Dorothy Smizer testified that Appellee didn't slow down at all. (R. 250). As such, the only undisputed fact is that Appellee was going no slower than 35 miles per hour. Appellee's repeated reliance on this disputed fact is inappropriate. The trial court abused its discretion when it accepted Appellee's version of the facts to the exclusion of other testimony. *Barton Solvents, Inc.*, 2014 SD 70, ¶ 10.

Appellee further suggests that Appellants couldn't prove that Appellee knew she needed to slow to 15 miles per hour at that intersection. RB, p. 7 ("While Drey did not slow her vehicle to 15 mph, the Smizers have no evidence that Drey knew she had to slow to 15 mph, or that even if she did, that she intentionally failed to slow to 15 mph."). Defendant's argument, however, violates the long-standing rule that ignorance is no excuse for violating a statutory duty. *See e.g.*, *State v. Klueber*, 81 S.D. 223, 132 N.W.2d 847 (1965) ("If a statute makes an act criminal irrespective of guilty knowledge then, ignorance of fact, no matter how sincere, is no defense."). *See also United States v. Feola*, 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975) (holding that defendant's ignorance that the person he assaulted was a federal officer was not an excuse for violating 18 U.S.C. § 111).

B. The Klein Affidavit meets the "Greater Convincing Force" standard for civil litigation.

Appellee parrots the trial court's contention that the Klein Affidavit is irrelevant to this matter. Appellee and the trial court, however, ignore two critical rules of evidentiary interpretation.

First, Appellee ignores that civil lawsuits follow the "greater convincing force" standard. S.D. Pattern Jury Instruction 1-60-10; *In re Estate of Duebendorfer*, 2006 S.D. 79, 721 N.W.2d 438. "Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true." *Id*. Each statement in the Klein affidavit states, at a minimum, that Kiley Klein's belief was more likely true than not true. *See e.g.*, (R. 279), ¶ 5 ("[M]y mother

and I narrowly averted a serious car collision with who we believe was likely Defendant Christina Drey….").[1]

Second, Appellee ignores that Rule 11 violations can only occur where a position is "so wholly without merit as to be ridiculous." *Pioneer Bank & Trust v. Reynick*, 2009 SD 3, ¶ 15, 760 N.W.2d 139. The Klein Affidavit lays out a factual basis that Drey narrowly averted a similar collision on a different occasion, which would support a claim for punitive damages against Appellee.

Regardless, Appellee's disputes over the Klein Affidavit are a bit of a red herring. Appellants provided the trial court numerous facts that would support a finding that Appellee acted willfully or wantonly. The trial court simply ignored those facts, abusing its discretion in the process.

C. Appellee's deposition testimony supports Appellants' argument that Appellee failed to look for oncoming traffic.

Appellee argues that Appellants misrepresented the record to suggest that Appellee failed to check for oncoming traffic. Appellee goes so far as to assert that Appellants never cited any testimony to support their claim. RB, p. 9 ("That testimony is never provided").

Curiously, Appellee misquotes Appellants' brief in order to make this argument. Appellee quotes from page 5 of Appellants' brief. Appellee substitutes a "." for the ":" without noting the modification. That punctuation substitution, however, hides Appellants' block quote:

> Q. What were you doing in the car as you approached the intersection where this collision occurred?

[1] Kiley Klein's affidavit mirrors what her mother, Karen Klein told Appellant Dorothy Smizer (R. 251).

A. Looking straight ahead.

(R. 264, 352). The fair inference from this testimony is that Appellee did not check for oncoming traffic. The trial court abused its discretion by refusing to interpret this testimony in Appellants' favor. *Barton Solvents, Inc.*, 2014 SD 70, ¶ 10.

Additionally, Appellee never addresses why her subsequent affidavit was improperly considered by the trial court. Appellee even admits that the trial court accepted her interpretation of the facts without explaining why Appellants' interpretation was unreasonable, as the trial court was required to do.

Appellee claims that her later affidavit was a "clarifying" affidavit. RB, p. 10. Appellee, however, never disputes that a party cannot assert a better version of the facts than her own deposition testimony. St. Pierre v. State ex rel. S.D. Real Estate Comm'n, 2012 SD 25, ¶ 24, 813 N.W.2d 151 (citations omitted). As Appellants noted, Appellee waited *months* before she submitted her "clarifying" affidavit and only *after* Appellants moved for partial summary judgment on punitive damages. Appellee's counsel was at the deposition. If Appellee's counsel truly thought that Appellee testified incorrectly, he had ample opportunity to correct the record. He didn't.

It cannot be sheer coincidence that Appellee's "clarifying" affidavit both contradicted her deposition testimony and mirrored her counsel's summary judgment argument. Appellee testified that she was looking straight ahead as she approached the intersection. The fact that she didn't check for oncoming traffic makes sense in light of how she regularly entered that intersection. Appellee knew her view was obstructed. Appellee also admitted that she regularly entered the intersection at no slower than 35 miles per hour. It would be *impossible* for Appellee to check for traffic if she was going

35 miles per hour with a blocked view as she approached the intersection. She was going too fast to check for oncoming traffic once her view of the road cleared. Appellee's argument is illogical and misplaced.

D. Dorothy Smizer's purported "concession" was no concession at all.

Appellee contends that Dorothy Smizer conceded that Appellee didn't intentionally fail to yield. Appellee quotes testimony from page 87 of Dorothy's brief in support of that contention. Curiously, Appellee fails to include the preceding question:

> Q. So you don't believe she tried to hurt you on purpose; is that right?
>
> A. No. She didn't try to hurt us on purpose, no. No one would try that.
>
> Q. That's all I was asking.
>
> A. No. But, no, she – she just – she was probably thinking of something else and just zipped on through there, and we happened to be coming along.

(R. 143-44). Appellee's counsel didn't ask Dorothy the question he suggests in his brief. In fact, he asked a completely different question: "So you don't believe she tried to hurt you on purpose?" *Id.* (R. 143). Given Appellee's counsel's question, it isn't surprising that Dorothy made a statement to lessen Appellee's culpability. Dorothy didn't want to suggest that Appellee intended to hurt her or Harlan.

Dorothy, however, consistently maintained[2] that Appellee didn't intend to stop:

> Q. You don't believe Chrissy tried to hit you on purpose, do you?
>
> …

[2] Even though there were competing motions for summary judgment on punitive damages, Appellants' counsel conceded that the parties' differing interpretations of these facts might create disputes of material facts for the jury to decide (R. 561-64).

A. I just think that she – she had no intentions of stopping. I mean, I really don't think she did. She was going too fast.

Q. And I understand that. But do you believe she had any intentions of hitting your car, though, is my question.

…

A. I just think she didn't think anybody would be coming.

(R. 260).

It is worth noting that Appellants' counsel objected to this line of questioning because it was asked and answered. In fact, Appellee's counsel repeatedly badgered Dorothy about whether Appellee intentionally failed to yield. Appellee's counsel started badgering Dorothy sixty pages earlier in her deposition:

Q. You don't contend that Chrissy intentionally hit your car though, do you?

A. Well, she intentionally did not yield.

Q. Well, how about intentionally hit your car. She didn't try to hit your car.

…

Q. Did Chrissy try to hit your car, ma'am?

A. She did not yield. She did not plan to yield.

(R. 251).[3]

Dorothy explained why she thought that Drey never intended to yield:

Q. How do you know she didn't yield then if you didn't see her until right before she hit you?

[3] Dorothy first discussed Appellee's intentional failure to yield in response to Appellee's counsel's request for a narrative of the collision: "And we were just going to church. And Chrissy came out from the side, did not yield at the yield sign and hit us and spun us around." (R. 250).

A. Because she was going too fast to yield.

Q. Do you know how fast Chrissy was going?

A. I would say she was going at least 40 miles an hour.

(R.250).

Additionally, Appellee failed to address Appellants' argument that asked and answered testimony must be disregarded. AB, p. 22 (*citing State v. Younger*, 453 N.W.2d 834, 839-40 (S.D. 1990) (noting that the trial court ordered that testimony objected to by an asked and answered objection be disregarded)). Because Appellee failed to address that issue with any supporting legal authority, Appellee waived it. *See Spenner v. City of Sioux Falls*, 1998 SD 56, ¶ 30, 580 N.W.2d 606 (*quoting Weger v. Pennington County*, 534 N.W.2d 854, 859 (S.D. 1995)). *See also Dunn v. Lyman School Dist. 42-1*, 35 F.Supp.3d 1068, 1088-89 (D.S.D. 2014) (noting that failure to address an argument in an opposition brief waives the argument). As such, even if Appellee hadn't taken Dorothy's quote out of context, it must be disregarded because it came as a result of objectionable asked and answered questioning. *Id.* The trial court abused its discretion by relying on this objectionable testimony. *Id.* It also creates an issue of disputed material fact. The trial court abused its discretion by failing to interpret these facts in Appellants' favor. *Barton Solvents, Inc.*, 2014 SD 70, ¶ 10.

Regardless, Appellee's ultimate inference – that a lack of prior similar incidents precludes punitive damages or negligence – has been explicitly rejected by this Court. *Janis v. Nash Finch*, 2010 SD 27, 780 N.W.2d 497. That is because, while recidivism can be demonstrative of intent,[4] it is not dispositive as to the foreseeability of harm. *Id.*, ¶

[4] SDCL § 19-12-5.

24 ("The trial court erred by allowing the lack of prior similar incidents to be determinative of foreseeability.").

E. Appellee and the trial court incorrectly interpreted the Skalla Affidavit.

Appellee continues to misread the Skalla affidavit. Skalla never definitely stated anything in his affidavit. Skalla *only* stated that he didn't *remember* anything. (R. 119). Appellants remembered otherwise. (R. 75). Appellee used this discrepancy to argue that Appellants were lying.

Appellee submitted the Skalla affidavit while the parties were briefing summary judgment. Neither party had deposed Skalla. Yet, the trial court accepted Appellee's interpretation of the Skalla affidavit without any regard for Appellants' recollection of those conversations. That constitutes reversible error. Stern Oil v. Brown, 2012 SD 56, ¶ 13, 817 N.W.2d 395 (reversing grant of summary judgment over disputed recollection of conversations).

II. Appellee and the trial court misstated and misinterpreted punitive damages and Rule 11 precedence.

Appellee and the trial court disregarded existing case law to craft an inappropriate standard for both punitive damages and Rule 11 sanctions. Appellee and the trial court also ignored numerous facts that would *require* the imposition of punitive damages against Appellee. In doing so, the trial court abused its discretion. Additionally, the trial court further abused its discretion by making factual determinations that should have been left to the jury. As a result, the trial court's grant of partial summary judgment and Rule 11 sanctions should be reversed.

A. Appellee admits that the trial court legally erred.

Appellee concedes that the speed limit as she approached the intersection was 15 miles per hour. *See eg.*, RB, p. 7. The trial court, however, based its decision to grant Rule 11 sanctions in large part on its finding that "[Appellee] was traveling on a road with a posted speed limit of 65 miles per hour, and she was traveling at 45 miles per hour prior to slowing down for the yield sign." (R. 489). The trial court's failure to acknowledge that the speed limit slowed to 15 miles per hour constitutes an abuse of discretion. Additionally, the trial court's failure to acknowledge that there was a dispute of material fact whether Appellee even slowed down constitutes an independent abuse of discretion requiring reversal.

In fact, this Court recently said, "[w]e might conceive of instances where a driver's speed *alone* would become willful, wanton, or reckless….." *Gabriel v. Bauman*, 2014 SD 30, ¶ 13, 847 N.W.2d 537 (emphasis added). It is undisputed that Appellee entered the intersection traveling at least 35 miles per hour. (R. 268, 328, 351). Although Appellee claims that she slowed down from 45 to 35, that fact is disputed. Appellant Dorothy Smizer testified that Appellee failed to slow down at all and was going no slower than 40 miles per hour:

> Q. Do you know how fast Chrissy was going?
>
> A. I would say she was going at least 40 miles an hour.
>
> Q. Did Chrissy ever tell you have fast she was going?
>
> A. No. But I saw by the police report she said 35, but she was coming full speed.

(R. 250).

At a minimum, Appellee was going 20 miles per hour over the speed limit as she entered an obstructed view intersection. That is undisputed. Under Rule 11, however, all inferences must go toward Appellants, meaning that Appellee failed to slow for the intersection at all and entered it at no slower than 25 miles per hour over the speed limit. Nationwide Mut. Ins. Co. v. Barton Solvents, Inc., 2014 SD 70, ¶ 10, 855 N.W.2d 145 ("We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party."). If Dorothy Smizer inferred that Appellee intentionally failed to yield because Appellee entered a graveled intersection at 25 miles per hour over the speed limit without slowing, a jury could draw the same conclusion. As such, the trial court abused its discretion. *Pioneer Bank & Trust*, 2009 SD 3, ¶ 15 (a claim must be "so wholly without merit as to be ridiculous" to justify Rule 11 sanctions).

B. Appellee doesn't dispute numerous facts that would support punitive damages.

Appellee argues that there are no facts that would support a claim for punitive damages. Appellee, however, never disputed numerous facts that support Appellants' claim for punitive damages. Curiously, the trial court omitted almost all of these facts in its opinion:

- Appellee knew about the yield sign because she traveled through the intersection of 294th Street and 347th Avenue "countless" times. (R. 265) ("Q. I assume that you've driven through that intersection probably countless times, haven't you? A. Yes.").

- Appellee knew it would be dangerous to pull out in front of approaching traffic at the intersection. (R. 269, 352) ("Defendant knew that pulling into traffic at an intersection controlled by a yield sign could be dangerous. Response: Admit.").

- Appellee knew that, with the yield sign, she had to be able to allow traffic on 347th Avenue to pass through the intersection, even if she had to come to a complete stop to do so. (R. 268, 352) ("Q. Do you also understand a

yield sign to mean that if there is somebody coming, that you have to be able to stop for them to allow them to pass through the intersection? A. Yes.").

- Appellee knew that, because she was on gravel, it would take her longer to stop than on a normal road. (R. 268) ("Q. And you knew that driving on a gravel road it takes you longer to come to a stop, true? A. Yes.").

- Appellee had an obscured view of oncoming traffic due to a cornfield next to the road. (R. 328) ("The intersection of the accident contained an obstructed view due to the location of the corn field.").

- Appellee approached the intersection at no less than thirty-five miles per hour, 20 miles per hour over the speed limit. (R. 352) ("Defendant entered the intersection of 294th Street and 347th Avenue at no less than thirty-five miles per hour. Response: Admit….").

- Appellee regularly entered the intersection going no less than thirty-five miles per hour. (R. 269, 352-53) ("Defendant testified that the speed she was driving on the day of the collision as she approached within a couple car lengths was about the speed that she would typically drive as she got up to the intersection. Response: Admit.").

It should be obvious to any driver that entering an obstructed view intersection with a yield sign between 35 and 45 miles per hour on a gravel road is inviting disaster. *See eg.*, *Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953, 956 (D. Kan. 1986) (a driver entering a controlled intersection at 42 miles per hour placed any potential oncoming motorist in "imminent danger."). To make it part of your regular practice, as Appellee admits, arguably constitutes willful or wanton conduct. *Id*.

C. South Dakota precedence supports Appellants' punitive damages claim.

All that Appellants need show is that Appellee acted *either* "willfully" or "wantonly" to justify punitive damages. SDCL 21-3-2; Biegler v. Am. Family Mut. Ins.

Co., 621 N.W.2d 592, 605 (S.D. 2001)). "'[R]eckless' is synonymous with 'wanton.'"[5] *Dahl v. Sittner*, 474 N.W.2d 897, 900 (S.D. 1991). "A claim for presumed malice can be shown by demonstrating a disregard for the rights of others." *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752, 761 (S.D. 1994) (citations omitted).

Contrary to Appellee's suggestion, this Court has held that behavior similar to Appellee's constitutes a willingness to injure another. In *State v. Muhs*, 81 S.D. 480, 137 N.W.2d, 237 (1965), this Court held that a motorist's failure to see or look for oncoming traffic at a familiar intersection amounted to a willingness to injure oncoming motorists:

> It was [the nonfavored driver's] duty to stop and to make, before and after entering the intersection, observations and to adapt his movements to accord with his own safety. Defendant was bound to effectively look for and observe the through highway to make certain it was free from oncoming traffic which may affect his safe passage and stop if necessary and yield the right of way….; to proceed without making any observations or to drive into the intersection knowing of the oncoming traffic would be sufficient basis for a finding the defendant drove without due caution and circumspection and in a manner likely to endanger another person or property.

Id., 483-84.

The defendant in *Muhs* was charged and convicted of reckless driving. The trial court found, and this Court agreed, that like Appellee here, the defendant was familiar with the intersection in question. The trial court found, and this Court agreed, that the objective evidence supported the contention that the defendant intentionally failed to yield based on testimony similar to Appellee's. Ultimately, the jury found, and this Court upheld, that the defendant in *Muhs* drove recklessly and "in a manner likely to endanger another person or property."

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[5] *See cf. Nelson v. Winnebago Indus., Inc*., 619 N.W.2d 385,390 (Iowa 2000) (in analyzing the Iowa Workers' Compensation Statute, wanton neglect falls "somewhere between mere unreasonable risk of harm in negligence and intent to harm.").

The objective facts here demonstrate that Appellee acted with a reckless disregard for the rights of the Appellants. *Isaac*, 522 N.W.2d at 761. Appellee understood the peril;[6] Appellee understood that the risk of injury was probable, as opposed to a possible;[7] and she consciously failed to avoid the peril.[8] The trial court erred by granting Appellee's motion for summary judgment on punitive damages. *Gabriel*, 2014 SD 30, ¶ 16. The trial court also abused its discretion by granting Appellee Rule 11 sanctions against Appellants.

D. Numerous other jurisdictions have allowed punitive damages under similar facts.

Neither the trial court nor Appellee cited *any case law* where another Court rejected a punitive damages claim under similar facts. On the other hand, Appellants cited numerous cases where courts allowed punitive damages against defendants under similar circumstances. In fact, some of those courts *overturned* lower courts' refusal to impose punitive damages under these facts.

Appellee tries to distinguish the numerous cases cited by Appellants, arguing that "the Smizers fail to inform the Court that the defendant had a stop sign as opposed to a

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[6] (R. 265) ("Q. I assume that you've driven through that intersection probably countless times, haven't you? A. Yes."); (R. 328) ("The intersection of the accident contained an obstructed view due to the location of the corn field."); (R. 268, 352) ("Q. Do you also understand a yield sign to mean that if there is somebody coming, that you have to be able to stop for them to allow them to pass through the intersection? A. Yes."); (R. 268) ("Q. And you knew that driving on a gravel road it takes you longer to come to a stop, true? A. Yes.").

[7] (R. 269, 352) ("Defendant knew that pulling into traffic at an intersection controlled by a yield sign could be dangerous. Response: Admit.")

[8] (R. 352) ("Defendant entered the intersection of 294th Street and 347th Avenue at no less than thirty-five miles per hour. Response: Admit…."); (R. 269, 352-53) ("Defendant testified that the speed she was driving on the day of the collision as she approached within a couple car lengths was about the speed that she would typically drive as she got up to the intersection. Response: Admit.")

yield sign." RB, p. 23. Appellants didn't make that distinction because this Court previouslyindicated that, for the purposes of a duty to yield, there *is no difference* between a stop and a yield sign. *Muhs*, 81 S.D. at 484.

Additionally, the Federal District Court of Kansas analyzed a similar situation and concluded that the defendant acted wantonly, requiring punitive damages:

> The uncontroverted evidence shows that Budnik had ample opportunity to see the two "stop ahead" signs, as well as the eventual stop sign. Yet, by her own testimony, she was traveling at forty-two to forty-three miles per hour as she entered the intersection. Given the number and placement of warning signs, the jury might well discredit Budnik's testimony that she failed to see them. Had Budnik actually seen the signs but nonetheless proceeded through the intersection without stopping, she should have realized that any traffic traveling through the intersection along Highway 59 would be in imminent danger of injury. Her failure to come to a stop could thus have constituted wanton conduct.

Fogarty v. Campbell 66 Express, Inc., 640 F. Supp. 953, 956 (D. Kan. 1986). Precedence supports Appellants' punitive damages claim. The trial court abused its discretion by ignoring that precedence.

E. Appellants sought punitive damages because Appellee acted willfully or wantonly, not for some improper purpose.

Appellee continues to baselessly assert that Appellants sought punitive damages against Appellee for an improper purpose. Appellants maintained from the outset that Appellee acted willfully or wantonly, disregarding Appellants' rights. *Isaac*, 522 N.W.2d at 761.

Appellee also attempts to portray Appellants' counsel's correspondence as some sign of an evil scheme. Those letters, however, only demonstrate that Appellants disagreed with the trial court's decision. Given the weight of case law in Appellants

favor – and *no cited case law* in Appellee's favor – Appellants correctly viewed the trial court's rulings on punitive damages as wrong.

Appellee's argument is also particularly curious since Appellee's counsel admitted that Appellee frivolously resisted liability to gain leverage over Appellants' punitive damages claim:

> I just talked to Ms. Drey, and she would agree to admit liability in this case. We could limit the scope of the trial to causation of damages, as well as damages, if any.
>
> But because of this punitive damages hanging above her head, damages that would inhibit her and follow her for the rest of her life – because her insurance, at least none that I know of, would cover punitive damages; nor are they likely to be dischargeable in bankruptcy – we have to fight hard back against this unwarranted and frivolous claim of punitive damages.

(R 547). Appellee's counsel's statement also demonstrates that her motion for Rule 11 sanctions was brought for an improper purpose. Furthermore, Appellee's argument that Appellants' punitive damages claims were frivolous was particularly disingenuous considering that Appellee failed to cite any analogous case law.

CONCLUSION

The trial court abused its discretion in several independent ways. It based its legal foundation on an erroneous reading of punitive damages precedence. It ignored numerous facts that other courts have held support a claim for punitive damages. It ignored numerous undisputed facts supporting Appellants' claim. It also relied on improper testimony and failed to interpret facts in Appellants' favor. Ultimately, the trial court improperly granted Appellee's motion for partial summary judgment and abused its discretion by granting Appellee's motion for Rule 11 sanctions. The trial court's order should be reversed.

Dated this 13th day of March, 2015.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Robert D. Trzynka
Michael D. Bornitz
Robert D. Trzynka
PO Box 1400
Sioux Falls, SD 57101-1400
Telephone: (605) 335-4950
Facsimile: (605) 335-4961
MikeB@cutlerlawfirm.com
BobT@cutlerlawfirm.com
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,933 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Robert D. Trzynka
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2015, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 13th day of March, 2015, I sent copies of the foregoing to Appellee's counsel by email and United States Mail, first class postage prepaid, to the following address:

Timothy A. Clausen
Ryland Deinert
KLASS LAW FIRM, L.L.P.
Mayfair Center, Upper Level
4280 Sergeant Road, Suite 290
Sioux City, IA 51106
Clausen@klasslaw.com
deinert@klasslaw.com

/s/ Robert D. Trzynka
One of the attorneys for Appellants